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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALFREDO DEVARGAS,

Petitioner,

—v.—

MASON & HANGER-SILAS MASON CO., INC.; T. R. HOOK; DON HARDWICK; DONALD KERR; ROBERT POGNA; and ED C. WALTERSCHEID,

Respondents.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the court below erred in concluding, contrary to two other circuits, that the Civil Rights Restoration Act of 1987 does not apply to cases that were pending at the time of its enactment?

LIST OF PARTIES

In addition to the parties appearing in the caption, the following defendants participated in the proceedings below: Los Alamos National Laboratory; Gary Granere; Regents of University of California; the United States Department of Energy; Donald Paul Hodel; John S. Herrington; John Doe; and Richard Roe.

With the exception of Mr. Granere, the claims against these defendants were dismissed for reasons outside the scope of the petition. Any claims against Mr. Granere that might be within the scope of the petition are no longer being pursued. *See* n.12, *infra*.

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No. 90-

IN THE
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ALFREDO DeVARGAS,

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MASON & HANGER-SILAS MASON CO., INC.; T. R. HOOK; DON HARDWICK; DONALD KERR; ROBERT POGNA; and ED C. WALTERSCHEID,

Respondents.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Alfredo DeVargas respectfully requests that a writ of *certiorari* issue to review the judgment entered in this case by the United States Court of Appeals for the Tenth Circuit on August 9, 1990.

OPINIONS BELOW

Petitioner initiated this action in 1983 alleging that he was denied employment solely because of his handicap in violation of the Constitution and §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

The district court's opinion granting summary judgment for respondents on petitioner's §504 claim, *inter alia*, was entered on April 9, 1986. It is reprinted in the Appendix at 1a-28a.

The district court's opinion dismissing petitioner's second amended complaint in its entirety was entered on December 14, 1988. It is reprinted in the Appendix at 29a-41a.

The district court's order denying petitioner's motion to alter or amend the judgment was entered on February 8, 1989. It is reprinted in the Appendix at 42a-43a.

The opinion of the Court of Appeals for the Tenth Circuit holding that the Civil Rights Restoration Act of 1987 does not apply to petitioner's §504 claim, although it was enacted during the pendency of this litigation, was entered on August 9, 1990. It is reported at 911 F.2d 1377, and is reprinted in the Appendix at 44a-75a.

An earlier opinion of the Court of Appeals finding that the private defendants were entitled to a qualified immunity defense on petitioner's constitutional claims was entered on April 7, 1988 and is reported at 844 F.2d 714 (10th Cir. 1988). That opinion, issued on the basis of an interlocutory appeal, reversed a district court opinion entered on October 21, 1986, which held that only the public defendants were entitled to immunity on petitioner's constitutional claims. These decisions have not been reprinted in the Appendix because the issues they address are beyond the scope of this petition.

JURISDICTION

The opinion of the Court of Appeals was entered on August 9, 1990. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

29 U.S.C. §794, as amended by the Civil Rights Restoration Act, provides in pertinent part:

(a) No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service . . . .

(b) For the purposes of this section, the term "program or activity" means all of the operations of --

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 2891(12) of Title 20) system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship --

(i) if assistance is extended to such corporation, partnership, private organization, or sole

proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance . . . .

STATEMENT OF THE CASE

A. Factual Background

Petitioner Alfredo DeVargas is a former policeman who is blind in one eye as a result of a childhood accident. Despite this disability, he majored in law enforcement in junior college, was certified as a law enforcement officer at the New Mexico Law Enforcement Academy, completed National Safety Council Defensive Driving courses, and was employed as a police officer in New Mexico for approximately seven years. His ability to perform the duties of a law enforcement officer in these various settings, including the handling of firearms, is undisputed in the record.

In 1981, petitioner applied for a job as a security inspector at the Los Alamos National Laboratory ("LANL"). LANL is a nuclear weapons and energy research facility operated by the Regents of the University of California pursuant to a contract with the United

States Department of Energy ("DOE"). In turn, the Regents chose to subcontract with Mason & Hanger-Silas Mason Co. ("Mason & Hanger"), a private corporation, to provide security personnel.

Notwithstanding petitioner's past record as a law enforcement officer, Mason & Hanger refused to process his 1981 application for security inspector solely because he was blind in one eye.[1] Two years later petitioner reapplied, and was again rejected for the same reason. The company claimed that these rejections were required by a then-applicable DOE regulation, Interim Management Directive No. 6102 ("IMD No. 6102"), which listed blindness in one eye as a medically disqualifying condition for security inspectors. However, IMD No. 6102 also contained a waiver provision allowing a designated physician to determine upon examination that an individual with an ordinarily disqualifying condition was, nevertheless, medically qualified to perform the duties of a security inspector.[2] For purposes of summary judgment, respondents did not dispute petitioner's assertion that he is an otherwise qualified handicapped individual. Yet, neither in 1981 nor in 1983 was petitioner given any opportunity to seek a waiver or to demonstrate that he was otherwise qualified to perform the job responsibilities of a security inspector.[3]

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[1] Under the Department of Energy regulations then applicable to the physical protection of classified matter and information at DOE facilities, security inspectors were defined as uniformed individuals who carry firearms and are charged with protecting government property, including special nuclear materials. Interim Management Directive No. 6102, App.IV, §A(6)(b)(8).

[2] In addition, the regulations provided that medically disqualifying conditions "shall be made by a designated physician." *Id.* at §(A)(3)(e). Petitioner was never seen by a physician before his applications were rejected.

[3] In November 1984, IMD No. 6102 was superceded by new regula-
(continued...)

After his second application was rejected, petitioner filed suit in federal court requesting declarative and injunctive relief as well as money damages. In his complaint he charged that the refusal to process his applications violated §504 of the Rehabilitation Act, 29 U.S.C. §794,[4] as well as his constitutional rights under the Fifth and Fourteenth Amendments.[5] Petitioner further alleged that DOE promulgated IMD No. 6102 in violation of §504 and the Fifth Amendment. The complaint named as defendants: Mason & Hanger and two of its employees; LANL; the Regents of the University of California ("Regents" or "University") and three University employees ("individual LANL defendants"); as well as DOE, the Secretary of Energy and the Acting Area Manager for DOE's LANL office.

B. Proceedings Below

In April 1986, the district court dismissed all of petitioner's claims against the Regents and LANL based on

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[3] (...continued)
tions, which are codified at 10 C.F.R. §1046. Like IMD No. 6102, the new regulations list one-eyed individuals as medically disqualified for security inspector duties. 10 C.F.R. §1046, Subpart B, App. A., §E.2.h. They also contain a waiver provision similar to that in IMD No. 6102.

[4] Section 504 prohibits discrimination against an otherwise qualified handicapped individual in any program or activity receiving federal financial assistance. Petitioner subsequently asserted in a second amended complaint that defendants had also violated §503 of the Rehabilitation Act, 29 U.S.C. §793, which requires that all government contracts in excess of $2,500 for the procurement of personal property and nonpersonal services contain a provision requiring affirmative steps to employ and advance qualified handicapped individuals.

[5] Petitioner, a Hispanic, originally alleged discrimination on the basis of national origin as well as handicap. That issue was resolved against petitioner, 36a -37a, and is not a part of this appeal.

their Eleventh Amendment immunity. 14a-16a.[6] The court also dismissed petitioner's damage claims against DOE and the DOE defendants who had been sued in their official capacities on grounds of sovereign immunity. 16a-17a.[7] Petitioner's facial challenge to the constitutionality of IMD No. 6102 was rejected. And, most importantly for purposes of this petition, the district court granted defendants' motion for summary judgment on petitioner's statutory claim under §504 of the Rehabilitation Act. 2a-8a.

The district court's ruling on the §504 claim rested squarely on this Court's decision in *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 626 (1984), which had limited §504's prohibition against discrimination to those specific programs receiving federal funds. 2a.[8] In particular, the district court found that Mason & Hanger's provision of a security force for LANL was not a program or activity receiving federal financial assistance and therefore, in the district court's view, not governed by the provisions of §504. 3a-8a.[9]

Six months later, the district court ruled that the remaining DOE and LANL defendants were entitled to qualified immunity on any damage claim arising from their alleged violation of petitioner's constitutional rights.

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[6] Congress subsequently abrogated any Eleventh Amendment defenses to a §504 claim that is based on conduct occurring after October 21, 1986. *See* 42 U.S.C. §2000d-7.

[7] The trial court granted the Secretary of Energy's motion to dismiss for insufficiency of service. 24a.

[8] The decision in *Consolidated Rail* was issued the same day as *Grove City College v. Bell*, 465 U.S. 555 (1984), and rested on the same reasoning.

[9] There is no dispute that other programs and activities of the University of California, both at its LANL operation and on its California campuses, receive federal financial assistance.

At the same time, the district court rejected the qualified immunity claim of the Mason & Hanger defendants, both corporate and individual, on the ground that private corporations could not raise a qualified immunity defense.

The Mason & Hanger defendants sought review of that ruling in an interlocutory appeal. While their appeal was pending, Congress enacted the Civil Rights Restoration Act of 1987.[10] Its purpose, as set forth in the preamble, was to "restore the prior consistent and longstanding executive branch interpretation and broad, institution-wide application of [Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title VI of the Civil Rights Act of 1964] as previously administered [before the decisions in *Grove City College v. Bell*, 465 U.S. 555 (1984) and *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984)]." Restoration Act, Pub. L.No. 100-259, 102 Stat. 28 (1988) at §2. In furtherance of that goal, the Act provides that prohibitions against discrimination by federally funded programs or activities must be applied on an institution-wide basis rather than a program-specific basis.

Shortly thereafter, the Tenth Circuit reversed the district court and held that the Mason & Hanger defendants were entitled to the same qualified immunity as the public defendants on petitioner's constitutional claims. The Tenth Circuit did not address the impact of the Restoration Act in this interlocutory ruling because petitioner's §504 claim was not before it at the time.

On remand, the district court rejected all of petitioner's remaining claims and, in December 1988, dismissed his complaint in its entirety without any mention of the

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[10] Although known as the Civil Rights Restoration Act of 1987, the Act was actually enacted over a presidential veto on March 22, 1988.

newly enacted Restoration Act. 29a-41a. Petitioner then appealed to the Tenth Circuit arguing, *inter alia*, that the district court had erred in rejecting his Rehabilitation Act claim.

The Court of Appeals affirmed the dismissal of petitioner's §504 claim on two grounds.[11] First, it held that Mason & Hanger did not receive federal financial assistance and thus was not subject to the antidiscrimination provisions of §504. 48a-50a. Second, it concluded that the Restoration Act was not meant to apply to cases pending at the time of its enactment and, accordingly, that petitioner could not pursue a §504 claim against the LANL defendants although the University of California clearly receives federal financial assistance, both at LANL and its California campuses. 51a-72a.[12]

The Tenth Circuit acknowledged that its ruling on the Restoration Act was squarely in conflict with contrary holdings by both the Second and Fifth Circuits.[13]

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[11] As the Tenth Circuit noted, respondents did not assert a qualified immunity defense to petitioner's §504 claim. 48a, n.4.

[12] Because of the Tenth Circuit's approach to this case, it never considered whether the Mason & Hanger defendants would be covered by §504 if the Restoration Act were deemed to apply to pending litigation. In petitioner's view, that issue can and should be explored by the district court in the first instance if the case is remanded for further proceedings. For present purposes, it is sufficient to note that Mason & Hanger, as a subcontractor, is in a very different position than the commercial airlines that this Court characterized as mere "beneficiaries" of federal funding in *Dep't of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986), and that the recipients of federal financial assistance cannot avoid their statutory obligations under §504 merely by hiring a subcontractor. By contrast, petitioner is no longer pursuing a §504 claim against defendant Granere, despite some confusion in the record. 72a.

[13] The Tenth Circuit was apparently unaware that its ruling on the Restoration Act also conflicted with the Eleventh Circuit's decision in *Lussier v. Dugger*, 904 F.2d 661 (11th Cir. 1990).

See Leake v. Long Island Jewish Medical Center, 869 F.2d 130 (2d Cir. 1989); *Ayers v. Allain*, 893 F.2d 732 (5th Cir.), *vacated and rev'd on other grounds*, No. 88-4103 (5th Cir. Sept. 28, 1990)(LEXIS, Genfed library, CtApp file)(*en banc*).[14] It also recognized that this conflict extended to its reasoning as well as its result.

Thus, contrary to every other circuit that has addressed the issue, the Tenth Circuit determined that the legislative history of the Restoration Act was not dispositive on the retroactivity question. 54a-62a. It therefore analyzed the question by reference to what it regarded as generally applicable retroactivity principles. Based on its review of the governing law, the Tenth Circuit concluded that this Court has developed two divergent lines of authority. It viewed one line, represented by *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), as holding that a court must apply the law in effect at the time it renders its decision, even in the absence of a clear congressional directive, unless to do so would cause manifest injustice. It viewed the other line, represented by *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S.Ct. 468 (1988), as standing for the principle that statutes are to be construed prospectively unless Congress has clearly indicated its intent that they be applied retroactively.

Believing *Bowen* and *Bradley* to be irreconcilable, the Tenth Circuit "chose" to disregard *Bradley* and apply *Bowen*. 66a. Under *Bowen*, the Tenth Circuit then ruled that the Restoration Act does not apply on appeal to petitioner's §504 claim. Petitioner now seeks *certiorari* to review that pivotal ruling in his case.[15]

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[14] The *en banc* opinion in *Ayers* was issued after the Tenth Circuit's decision in this case and does not address the Restoration Act.

[15] The Tenth Circuit also rejected other claims by petitioner that are not before the Court on this petition for *certiorari*.

REASONS FOR GRANTING THE WRIT

Congress adopted the Civil Rights Restoration Act of 1987 to correct what it perceived to be this Court's erroneous intepretation of congressional intent in *Grove City College v. Bell*, 465 U.S. 555.[16] The question presented by this case is whether the benefits of that clarification should be denied to litigants whose cases were pending at the time of the Act's enactment.

Petitioner respectfully submits that this issue warrants plenary review for three independent reasons. First, the Tenth Circuit's refusal to apply the Act's remedial provisions to pending litigation is directly contrary to the holding of two other circuits. Second, the decision below effectively frustrates congressional intent on a civil rights issue of national significance. Third, the decision below reflects confusion in the lower courts regarding the scope and consistency of this Court's retroactivity decisions.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH CONTRARY HOLDINGS BY THE SECOND AND ELEVENTH CIRCUITS

This case presents a classic conflict among the circuits. In granting summary judgment for defendants in this case, the Tenth Circuit concluded that the Civil Rights Restoration Act of 1987 should not apply to litigation pending at the time of its enactment. Two other circuits have reached precisely the opposite conclusion. *See Leake v. Long Island Jewish Medical Center*, 869 F.2d 130 (2d Cir. 1989)(*per curiam*); *Lussier v. Dugger*, 904

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[16] The holding of *Grove City* was extended to §504 in the companion case of *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624. *See* n.8, *supra*.

F.2d 661 (11th Cir. 1990).[17] Neither the reasoning nor result of those cases can be reconciled with the decision below.

The plaintiff in *Leake* was a hospital worker with only one arm who alleged that he was fired because of his handicap in violation of §504. Like the complaint in this case, the complaint in *Leake* was filed prior to passage of the Restoration Act. But, unlike the Tenth Circuit, the *Leake* court was persuaded by the language and legislative history of the Act that it should be applied to pending litigation.[18] In support of that conclusion, the *Leake* court cited several statements by the Act's sponsors. *See* Point II, *infra*. It also stressed that the title and purpose of the Act plainly imply retroactivity, even if Congress did not state so explicitly.[19]

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[17] *See also Ayers v. Allain*, 893 F.2d 732 (5th Cir.), *vacated and rev'd on other grounds*, No. 88-4103 (5th Cir. Sept. 28, 1990)(LEXIS, Genfed library, CtApp file)(*en banc*).

[18] This discussion of *Leake* primarily refers to the reasoning of the district court, 695 F.Supp. 1414 (E.D.N.Y. 1988), which was unanimously adopted by the Second Circuit.

[19] The panel decision in *Ayers* applied a similar analysis and reached a similar conclusion. Although its opinion was subsequently vacated on other grounds, *see* n.14, *supra*, its reasoning is instructive and was discussed at length by the Tenth Circuit. 59a-62a. As the *Ayers* panel explained:

> Retroactive application of a statute is appropriate when Congress enacts the statute to clarify the Supreme Court's interpretation of previous legislation thereby returning the law to its previous posture. This rule flows from two of the Supreme Court's canons of statutory construction. First, subsequent legislation declaring the intent of an earlier statute is entitled to great weight . . . Second, the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.

893 F.2d at 755 (footnotes omitted).

In *Lussier*, the Eleventh Circuit joined the Second Circuit in holding that the Restoration Act was meant to apply to pending litigation. The plaintiff was a dentist in the Florida state prisons who contested the fact that he was not rehired, in violation of §504, after recovering from hepatitis. As in *Leake*, the case was pending in the district court when the Restoration Act was enacted.

Focusing on the issue of congressional intent, the Eleventh Circuit agreed with the analysis adopted by the Second Circuit:

> In this instance the history of the 1988 legislation reveals no hint that Congress intended the amendment to apply prospectively only. Indeed, the language of the amendment, which makes repeated assertions that the statute will "restore" and "clarify" Congress' original intent to apply the antidiscrimination laws broadly, is strongly consistent with retroactive application. Finally, and of the utmost importance, the statute's sponsors stated in debate that the bill should apply retroactively.

904 F.2d at 666 (footnote omitted).[20]

The Tenth Circuit adopted a totally different approach. It found no evidence of congressional intent on the issue of retroactivity, resorted to a presumption that other courts found inapplicable, and reached a conclusion directly at odds with the Second and Eleventh Circuits. Only this Court can now resolve that conflict.

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[20] In addition to the circuit court decisions mentioned above, at least one district court has also held that the Restoration Act applies to litigation pending at the time of its enactment. *See Bonner v. Arizona Dep't of Corrections*, 714 F.Supp. 420, 422-23 (D.Ariz. 1989).

II. THE DECISION BELOW IS INCONSISTENT WITH CONGRESSIONAL INTENT ON A CIVIL RIGHTS ISSUE OF NATIONAL SIGNIFICANCE

The Tenth Circuit's interpretation of the Restoration Act is not only inconsistent with the view of two other circuits, it is also inconsistent with the Act's essential purpose, which was to "restore" the law to what it had been prior to this Court's decision in *Grove City*. In the Tenth Circuit's view, that purpose is served if the Act's remedial provisions are only applied to claims arising after the Act's passage. Congress, however, had a broader purpose in mind.

That broader purpose is reflected in the language of the statute itself, the committee report that accompanied it, and the remarks of key legislators who supported it. Relying on these traditional indicia of legislative intent, two circuits have held that the Restoration Act was meant to apply to pending litigation. *See* Point I, *supra*. The Tenth Circuit, by contrast, refused to rely on the traditional tools of statutory construction. Instead, it apparently concluded that Congress' failure to include a retroactivity provision in the Act necessarily means that Congress had no position on the retroactivity issue. This Court's decisions do not support that conclusion. *See* Point III, *infra*. Nor does a fair reading of the legislative record.

To the contrary, it seems perfectly clear that Congress did not include an express retroactivity provision in the Act because Congress did not believe it was creating new rights. As explained in the Act's preamble: "[L]egislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of the [civil rights] laws as previously administered." Once this purpose was accomplished, Congress quite evidently felt that the law would return to what it had been prior to *Grove City* and the issue of retroactivity would never arise in the classic

sense.[21]

This view was expressed repeatedly throughout the legislative debates. For example, Senator Packwood responded to critics of the bill by commenting that: "[A]ll we have done is change the law back to what we thought it was. We have not expanded it beyond what we thought it was." 134 Cong. Rec. S2735 (daily ed. Mar. 22, 1988). Senator Stafford, one of §504's original sponsors, noted that an "institution-wide definition [was] originally intended by legislators." *Id.* at 2739. The Senate Report recommending passage of the Act described the impact of *Grove City* on civil rights claims and then observed that some of the cases affected by *Grove City* "were in the formal enforcement stage [and thus] still in jeopardy." S.Rep. No. 64, 100th Cong., 2d Sess. 2, *reprinted in* 1988 U.S Code Cong. & Admin. News 3, 13. Finally, Congressman Edwards, who served as floor sponsor of the bill during the debate to override President Reagan's veto, clearly and unequivocally stated that, "this bill applies to all pending cases . . . ." 134 Cong. Rec. H583 (daily ed. Mar. 2, 1988).

Review by this Court is essential because the error committed by the Tenth Circuit goes to the heart of one of this nation's basic civil rights statutes. If left unaddressed, it will produce the anomalous result of condoning discrimination that Congress has twice condemned. In effect, petitioner and those like him will be forced to bear the burden of what has turned out to be this Court's erroneous interpretation of congressional intent in *Grove City*. That allocation of costs is both unnecessary and unjust in a civil rights context.

Congress adopted the Restoration Act to "reaffirm" its commitment to a broad construction of the civil rights laws that had been narrowly construed by the *Grove City*

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[21] *See* n.22, *infra*.

decision. S.Rep. No. 64, *supra*, at 2. It should not be frustrated in achieving that goal for a second time.

III. THE DECISION BELOW REFLECTS CONFUSION IN THE LOWER COURTS REGARDING THE MEANING OF RETROACTIVITY AND THE APPROPRIATE STANDARDS TO APPLY

The court below, "upon determining that the language and legislative history of the Restoration Act [did] not evidence a clear congressional intent for or against its retroactive application, [turned] to Supreme Court precedent for guidance." 62a. Based on that review, the Tenth Circuit concluded that this Court has set forth conflicting presumptions on the issue of retroactivity.[22] Specifically, the Tenth Circuit read *Bradley v. Richmond School Board*, 416 U.S. 696, as announcing a presumption in favor or retroactivity. At the same time, it read *Bowen v. Georgetown University Hospital*, 488 U.S. 204, as announcing a presumption against retroactivity. If that quandary is real, it needs to be resolved. If the quandary is false, as petitioner believes, the relevant principles obviously need to be clarified.

Bradley involved a class action brought to desegregate the Richmond, Virginia school system. The specific

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[22] Part of the confusion lies in the ambiguous use of the term "retroactivity." In fact, there are two quite different contexts in which the term is frequently employed: (1) "true retroactivity," in which a regulation or statute is applied collaterally to a final judgment, *e.g.*, *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (rejecting such application); and (2) application of a newly enacted statute to pending litigation, *e.g.*, *Bradley v. Richmond School Board*, 416 U.S. 696 (endorsing such application). *See also Kaiser Aluminum & Chem. Co. v. Bonjorno*, ___ U.S. ___, ___, 110 S.Ct. 1570, 1591 (1990)(White, J., dissenting)(true retroactivity refers to "the application of a change in law to overturn a judicial adjudication of rights that has already become final").

issue facing the Court was whether an attorney's fee statute that became effective during the pendency of the appeal was to be applied by the appellate court. Relying on *Thorpe v. Durham Housing Authority*, 393 U.S. 268 (1969), this Court held that "a court is to apply a law in effect at the time it renders its decision," unless doing so would result in manifest injustice, *Bradley*, 416 U.S. at 716-17, or unless there is "statutory direction or legislative history to the contrary." *Id.* at 711. *Bradley* and *Thorpe* expressly reject "the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." *Id.* at 715 (footnote omitted).

In *Bowen*, the Court was confronted with the question of whether the Secretary of Health and Human Services had the authority to promulgate a retroactive Medicare cost-limit rule that would have required seven hospitals to refund $2 million that they had received under the old reimbursement rule. The new regulation was in fact a reissuance of a rule previously struck down as a result of litigation brought by the hospitals because its promulgation had violated the Administrative Procedure Act notice and comment requirements. Rather than appeal, the Secretary had chosen to begin anew, had complied with APA requirements and then reissued a rule with explicitly retroactive effect.[23]

The *Bowen* Court found that the Secretary did not have authority under either general administrative law or under the specific enabling legislation to issue retroactive cost-limit rules. In so ruling, the Court stated that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language

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[23] Thus, unlike *Bradley*, *Thorpe*, and this case, *Bowen* did not involve the application of a law or regulation to pending litigation. *See* n.22, *supra*.

requires this result." *Bowen*, 109 S.Ct. at 471.

The "apparent tension" between *Bradley* and *Bowen* has been the subject of recent comment by this Court. *See Kaiser Aluminum & Chem. Co. v. Bonjorno*, 110 S.Ct. at 1577. It has also caused confusion in the lower courts.[24] Justice Scalia's concurring opinion in *Kaiser* referred to the "irreconcilable conflict" between *Bradley* and *Bowen*. 110 S.Ct. at 1579. Justice White's dissent in *Kaiser*, joined by three other justices, characterized the "tension [as] more apparent than real." *Id.* at 1591. The *Kaiser* majority, adopting a middle road, noted the confusion but left it unresolved "because under either view, where the congressional intent is clear, it governs." *Id.* at 1577.

Petitioner shares Justice White's view that the "tension" between *Bradley* and *Bowen* can in fact be resolved and that the resolution most often lies, as the *Kaiser* majority found, in a fair and diligent search for legislative intent. Petitioner also believes that the legislative intent in this instance is clear and was wrongly ignored by the Tenth Circuit. *See* Point II, *supra*. It is nonetheless plain that the lower courts need further guidance in this area and, indeed, are actively seeking it. This case provides an appropriate vehicle for that instruction.

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[24] *See, e.g., Wright v. Director, Federal Emergency Management Agency*, No. 89-4033 (11th Cir. Oct. 11, 1990)(LEXIS, Genfed library, CtApp file); *Alpo v. Ralston Purina Co.*, No. 89-7181, 7264 (D.C.Cir. Sept. 7, 1990)(LEXIS, Genfed library, CtApp file); *Sargisson v. United States*, No. 90-5034 (Fed.Cir. Aug. 31, 1990)(LEXIS, Genfed library, CtApp file); *Gruber v. Price Waterhouse*, 911 F.2d 960 (3d Cir. 1990); *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990).

CONCLUSION

For the reasons stated above, the petition for *certiorari* should be granted.

Respectfully submitted,

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Dated: November 2, 1990

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ALFREDO DeVARGAS,

Plaintiff,

vs. CV No. 83-1674 HB

MASON & HANGER-SILAS MASON CO., INC., T. R. HOOK, individually and in his official capacity; DON HARDWICK, individually and in his official capacity; THE UNITED STATES DEPARTMENT OF ENERGY, DONALD PAUL HODEL, individually and in his official capacity; GARY GRANERE, individually and in his official capacity; JOHN DOES ONE AND TWO, individually and in their official capacity; LOS ALAMOS NATIONAL LABORATORY; REGENTS OF THE UNIVERSITY OF CALIFORNIA; DONALD KERR, in his individual capacity; ED C. WALTERSCHEID, in his official capacity; and RICHARD ROES ONE AND TWO, in their official capacity,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on a number of pre-trial motions filed by the plaintiff and the defendants. The Court has considered the motions, the memoranda and exhibits filed by the parties in conjunction therewith, the entire record, and consulted the applicable authorities.

This is a civil rights action arising out of the alleged refusal of defendants Mason & Hanger-Silas Mason Co., Inc., and its employees, T. R. Hook and Don Hardwick ("the Mason & Hanger defendants"), to consider plaintiff's application for a position as a security inspector at the Los Alamos National Laboratory ("LANL") facilities in Los Alamos, New Mexico. Mason & Hanger employs individuals as security inspectors at LANL pursuant to a subcontract with LANL. LANL, in turn, is organized pursuant to a contract between the United States Department of Energy ("DOE") and The Regents of the University of California, and is engaged in weapons and atomic energy research.

Plaintiff has only one eye. He applied for employment at Mason & Hanger in November, 1981, and again in 1983. Plaintiff alleges that the defendants' refusal to consider his application for employment constituted a violation of Section 504 of the Rehabilitation act [sic] of 1973, 29 U.S.C. § 794 (1982 ed.), and unlawfully discriminated against him because of his Mexican-American or Spanish-American ancestry, handicap, and/or exercise of his First Amendment right of free association, in violation of 42 U.S.C. § 1983 (1976). Plaintiff further alleges that the above actions by the defendants also violated plaintiff's rights guaranteed under the First and Fifth Amendments. Finally, plaintiff alleges that DOE regulation, Interim Management Directive No. 6102, is unconstitutional and violates Section 504 of the Rehabilitation act [sic] of 1973 and the Fifth Amendment.

I. Plaintiff's Claim Under the Rehabilitation Act

Plaintiff's first cause of action claims relief under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("section 504"). The Rehabilitation Act established "a comprehensive federal program aimed at improving the lot of the handicapped." Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 626 (1984). Among the Act's goals were the promotion and expansion of "em-

ployment opportunities in the public and private sectors." 29 U.S.C. § 701(8). In furtherance of these goals, Congress enacted section 504 of the Act, which provides, in pertinent part:

> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794.

Plaintiff claims that he is an otherwise qualified handicapped individual who has been denied employment solely on the basis of his handicap. He further alleges that he was subjected to such discrimination by Mason & Hanger and the Regents, who he alleges are contractors receiving federal financial assistance. Defendants claim that section 504 does not apply to Mason & Hanger, and urge this Court to grant their motion for summary judgment as to Count I of plaintiff's complaint.

Defendants do not contest that plaintiff is an "otherwise qualified handicapped individual" who has, "solely by reason of his handicap" been denied employment as a security inspector at LANL by Mason & Hanger. They contend, however, that Mason & Hanger's provision of a security force for LANL is not a "program or activity receiving Federal financial assistance," as specified in section 504. The term "federal financial assistance" is not defined in the Rehabilitation Act. Courts interpreting this language, however, have uniformly focused on the word "assistance" in determining whether a particular program or activity is required to conform to the mandates of the Act. See, e.g., Paralyzed Veterans of America v. C.A.B., 752 F.2d 694 (D.C. Cir.), cert. granted, 54 U.S.L.W. 3270 (U.S. Oct. 21, 1985); Frazier v. Board of

Trustees of Northwest Mississippi Regional Medical Center, 765 F.2d 1278 (5th Cir. 1985); Hingson v. Pacific Southwest Airlines, 743 F.2d 1408 (9th Cir. 1984); Jacobson v. Delta Airlines, Inc., 742 F.2d 1202 (9th Cir. 1984), cert. dismissed, 53 U.S.L.W. 3790 (U.S. Apr. 27, 1985); United States v. Baylor University Medical Center, 736 F.2d 1039 (5th Cir. 1984), cert. denied, 53 U.S.L.W. 3528 (U.S. Jan. 21, 1985); Lemmo v. Wilson, 583 F.Supp. 557 (D. Colo. 1984); Bachman v. American Society of Clinical Pathologists, 577 F.Supp. 1257 (D. N.J. 1983); Cook v. Budget Rent-A-Car Corp., 502 F.Supp. 494 (S.D.N.Y. 1980); Rogers v. Frito-Lay, Inc., 433 F.Supp. 200 (N.D. Tex. 1977), aff'd on other grounds, 611 F.2d 1074 (5th Cir.), cert. denied, 449 U.S. 889 (1980).

In Cook v. Budget Rent-A-Car, plaintiff alleged that the defendant corporation had refused to rent him an automobile solely because of his handicap. He claimed that defendant was a recipient of federal financial assistance because it received funds from the federal government under automobile rental contracts with several federal agencies. The district court rejected plaintiff's claim under section 504 of the Rehabilitation Act, finding that the defendant was not a recipient of federal financial assistance. 502 F.Supp. at 502. Construing the plain language of the statute, the court stated that it found "the use of the specific word 'assistance' to be most striking. This word connotes such transactions as a transfer of government funds by way of a subsidy, or a sale of government assets at reduced consideration." Id. at 496. See also Hingson v. Pacific Southwest Airlines, supra at 1414 ("Government mail contracts, however, constitute 'federal financial assistance' for purposes of section 504 only if they involve a subsidy to the airline"); Lemmo v. Wilson, supra at 560 ("there is no 'assistance' where the government hires property at its fair market value").

Plaintiff points to the legislative history of the Atom-

ic Energy Act, 42 U.S.C. §§ 2011 et seq., to support his assertion that both the Regents and Mason & Hanger are recipients of federal financial assistance by virtue of Congress' determination to provide research assistance for research and development of the atomic energy industry. Even if LANL was established for the purpose of receiving Congressional assistance to the nuclear industry, however, LANL is not the "program or activity" at issue in this case. The Rehabilitation Act's ban on discrimination is limited to the specific program that receives federal funds. Consolidated Rail Corp. v. Darrone, supra at 636. Mason & Hanger denied employment to the plaintiff. Therefore, plaintiff's Rehabilitation Act claim can withstand the defendants' motion for summary judgment only if Mason & Hanger's provision of security personnel to LANL is a "program or activity receiving Federal financial assistance."

It is undisputed that the Department of Energy's purpose in replacing federal security personnel at LANL with personnel provided by a private subcontractor (Mason & Hanger) was not to provide assistance to the subcontractor, but rather to obtain necessary security services in a cost-effective and efficient manner. The House Subcommittee on Procurement and Military Nuclear Systems of the Committee on Armed Services heard testimony that the estimated savings to the government by contracting out guard services would be approximately $3,500,000 over a three-year contract period. Exhibit C, p. 13, Brief in Support of Defendants' Motion to Dismiss the First Amended Complaint and Summary Judgment. The contract between the University of California and Mason & Hanger stipulates that the goal of the University is to have the subcontractor perform assigned tasks at the most cost effective level of professional proficiency obtainable. Exhibit B, Part III, C § (6), p. 7, Brief in Support of Defendants' Motion to Dismiss the First Amended Complaint and Summary Judgment. Nowhere in the contract between the Depart-

ment of Energy and the Board of Regents, in the contract between the Board of Regents and Mason & Hanger, or in the proceedings before the House Subcommittee on Procurement and Military Nuclear Systems of the Committee on Armed Services is it suggested that the purpose of subcontract for security personnel at LANL is "assistance" in any sense of that word.

Straightforward statutory construction suggests that Mason & Hanger was not the recipient of "federal financial assistance" and, therefore, not subject to section 504 of the Rehabilitation Act. Furthermore, the administrative regulations implementing section 504 direct the same conclusion. Each department of the federal government was charged with developing regulations implementing the Rehabilitation Act. The department [sic] of Energy regulations implementing nondiscrimination statutes including the Rehabilitation Act explicitly state that such implementing regulations do not apply to "Procurement contracts under Title 41 CFR Part 1 or Part 9." 10 C.F.R. § 1040.2(b)(3)(1985).[1]

Procurement is defined in 41 C.F.R. § 1-1.209 (1984):

> 'Procurement' means the acquisition

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[1] In excluding procurement contracts from programs or activities to which the nondiscrimination provisions apply, the Department of Energy regulations are consistent with those of other governmental departments. See, e.g., 45 C.F.R. § 84.3(h) (1985) (Department of Health and Human Services); 29 C.F.R. § 32.3 (1985) (Department of Labor); 7 C.F.R. § 15b.3(g) (1985) (Department of Agriculture); 32 C.F.R. § 56.3(b) (1985) (Department of Defense); 43 C.F.R. § 17.202 (h) (1985) (Department of Interior); 28 C.F.R. § 42.540(f) (1985) (Department of Justice); 22 C.F.R. § 142.3(h) (1985) (Department of State); 38 C.F.R. § 18.403(h) (1985) (Veterans Administration). Construction of the statute by a department charged with its administration is traditionally given great deference on judicial review. New York State Department of Social Services v. Dublino, 413 U.S. 405, 421 (1973).

> (and directly related matters), from non-Federal sources, of personal property and nonpersonal services (including construction) by such means as purchasing, renting, leasing (including real property), contracting, or bartering, but not by seizure, condemnation, donation, or requisition.

Furthermore, subpart 9 provides that a procurement contract "shall be used as the legal instrument to reflect a relationship between the Federal Government and a state or local government or other recipient whenever (1) the principal purpose of the instrument is the acquisition by purchase, lease, or barter, of property, or services for the direct benefit or use of the Federal Government." 41 C.F.R. § 9-1.5102(b)(1984).

Applying these definitions, the governmental regulations define contracts such as the one between the Regents and Mason & Hanger as procurement contracts. The word "procurement" is also used repeatedly at the proceedings before the House Subcommittee on Armed Services, to characterize the proposed contract for the provisions of security personnel at LANL. See, e.g., Statement on Behalf of Los Alamos Protective Force Members to a Hearing of the U.S. House Armed Services Committee, Los Alamos, New Mexico, January 9, 1981, p. 33 ("This procurement is for a defense effort"); Enclosure 1, Proposal Contracting For Certain Guard-Related Functions at Los Alamos, Exhibit 4, p. 6 ("LAAO Counsel is of the opinion that a competitive procurement is the only viable approach"; "it is very desirable to complete the procurement process as soon as possible"); Fact Sheet Concerning Contracting Out Selected Guard Functions at Los Alamos, Exhibit 12, p. 2 ("The guard service will be secured through the competitive procurement process"). Mason & Hanger's contract for provision of security personnel to LANL is a

procurement contract.

Although construction of the Department of Energy's exclusion of procurement contracts from programs and activities subject to the nondiscrimination statutes appears to be a matter of first impression, other departmental regulations excluding procurement contracts have been upheld on judicial review. See, e.g., Jacobson v. Delta Airlines, Inc., supra at 1209. ("The relevant legislative history leaves no doubt that the HEW's definition of federal financial assistance as not including procurement contracts is correct"). See also Rogers v. Frito-Lay, Inc., supra. Furthermore, "neither the language, purpose, nor history of Section 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds." Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979). Procurement contracts are not federal financial assistance. Therefore, Mason & Hanger's procurement contract with the Board of Regents for the provision of security personnel at LANL is not a "program or activity receiving Federal financial assistance," and section 504 of the Rehabilitation Act does not apply. Defendants' motion for summary judgment as to plaintiff's Rehabilitation Act claim is well-taken and will be granted.

II. Defendants' Challenge to Plaintiff's § 1983 Claim

Defendants move to dismiss, or, if matters outside the pleadings are considered, for summary judgment, as to Count III of plaintiff's complaint, in which he alleges a cause of action for unconstitutional conduct by the defendants in violation of 42 U.S.C. § 1983. Defendants challenge plaintiff's section 1983 claim on three grounds: first, they claim that insofar as plaintiff seeks relief under section 504 of the Rehabilitation Act as the basis for his section 1983 claim, he has failed to state a claim for which relief may be granted; second, the defendants were not acting "under color of state law," and therefore plaintiff's section 1983 claim must fail; and, third, de-

fendants are entitled to qualified, or "good faith" immunity for their conduct in reasonably relying on a valid governmental regulation, and plaintiff's section 1983 claim is, therefore, barred.

First, defendants argue that plaintiff seeks enforcement of rights under section 504 of the Rehabilitation Act as one of the bases of his section 1983 claim, and that the rights asserted by the plaintiff are governed by section 503 of the Act, not section 504. Section 503 imposes on federal contractors an affirmative obligation to hire the handicapped. Defendants claim that rights governed by section 503 are not cognizable under section 504 of the Rehabilitation Act, so cannot form the basis for a section 1983 claim. Insofar as defendants are arguing that a claim which could be brought under section 503 of the Rehabilitation Act precludes a claim under section 504, their contention is refuted by 41 C.F.R. § 60-741.1 (1985), which provides:

> Compliance of a contractor with the provisions of this part [requiring compliance with section 503] will not necessarily determine its compliance with the requirements of section 504 of the Rehabilitation Act of 1973[.]

Insofar as defendants are arguing that there is no private right of action under section 504 of the Rehabilitation Act, their contention is refuted by Pushkin v. Regents of the University of Colorado, 658 F.2d 1372, 1380 (10th Cir. 1981). Furthermore, in Pushkin, the Tenth Circuit Court of Appeals recognized that a cause of action under section 1983 could be based on a violation of substantive rights conferred by section 504 of the Rehabilitation Act. Id. at 1382.

Nevertheless, defendants' contention that plaintiff's Third Cause of Action has failed to state a claim for which relief may be granted is well-founded insofar as

plaintiff's claim is based upon violations of the Rehabilitation Act, because Mason & Hanger is not a recipient of "federal financial assistance." See discussion in Part I, supra. Plaintiff cannot circumvent the requirements of the Rehabilitation Act by pleading the same cause of action again under section 1983. Defendants' motion to dismiss plaintiff's Count III insofar as plaintiff relies on a violation of section 504 of the Rehabilitation [Act] [sic] is well-taken and will, therefore, be granted.

In Count III plaintiff also alleges that defendants discriminated against him, in violation of his constitutional right to equal protection of the laws and freedom of association. In order for the plaintiff to state a cause of action, the defendants' conduct must constitute action "under color of state law." Defendants claim that the remainder of plaintiff's section 1983 action should fail because they were not acting "under color of state law."

The United States Supreme Court has articulated a two-part inquiry to determine whether conduct that allegedly caused a constitutional deprivation can be fairly attributable to the State: "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible .... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982).

In this case, the two-part Lugar test for state action is satisfied. Defendants do not dispute that the Regents of the University of California and the LANL defendants are state actors; they challenge, however, plaintiff's characterization of the actions of the DOE defendants and Mason & Hanger as "state action." Brief in Support of Defendants' Motion to Dismiss the First Amended Complaint and for Summary Judgment, 42-43. Plaintiff alleges a conspiracy between all the defendants to deprive

him of his civil rights. Both federal actors (the DOE defendants) and private actors (Mason & Hanger), "jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." Adickes v. Kress & Co., 398 U.S. 144, 152 (1970) (citing United States v. Price, 383 U.S. 787, 794 (1966)). Therefore, all the defendants are state actors for purposes of the second prong of the Lugar test.

The first inquiry of the Lugar test is also satisfied, because the conduct of which plaintiff complains resulted from "a rule of conduct having its source in state authority." Gilmore v. Salt Lake Community Action Program, 710 F.2d 632, 638 (10th Cir. 1983). LANL is organized under a contract between the DOE and the Regents of the University of California. Exhibit A, Brief in Support of Defendants' Motion to Dismiss the First Amended Complaint and for Summary Judgment. Mason & Hanger provides security personnel to LANL pursuant to a contract between the Regents and Mason & Hanger. Exhibit B, Brief in Support of Defendants' Motion to Dismiss the first Amended Complaint and for Summary Judgment. Mason & Hanger is required to implement federal regulations in hiring security personnel for Los Alamos. Id. at 39, 40, 44, Appendix B at 4. Because a State may be held responsible for private decisions when it has exercised coercive power or provided significant encouragement for those decisions, Blum v. Yaretsky, 457 U.S. 991, 1004 (1982), the Regents' decision to enter into a contract with the DOE, and their enforcement of federal regulations in their contract with Mason & Hanger, can be deemed to be state action, and therefore satisfy the first prong of the Lugar test. Defendants' contention that the DOE defendants and Mason & Hanger are not state actors is, therefore, without merit, and their motion for summary

judgment as to Count III of plaintiff's Complaint on this basis will be denied.

Finally, defendants contend that they are entitled to qualified, or "good faith" immunity, because of their reasonable reliance on a valid regulation, interim [sic] Management Directive 6102 (IMD 6102). "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Defendants have produced no evidence, however, of their reliance on IMD 6102. Although counsel for defendants argue that defendants reasonably relied on IMD 6102 in denying employment to the plaintiff, the arguments of counsel are not evidence. Furthermore, Count III includes more than merely a claim that defendants' conduct in applying IMD 6102 was unconstitutional; plaintiff claims violations of his constitutional rights of equal protection and freedom of association. Defendants' claims of good faith immunity do not apply to these constitutional claims under section 1983. Defendants' motion to dismiss Count III on the basis of qualified immunity is, therefore, without merit and will be denied.

III. Defendants' Challenge to Plaintiff's Bivens Action

Defendants move to dismiss Count IV of plaintiff's Complaint, in which he alleges a cause of action for conduct by the defendants in violation of the Fifth Amendment to the Constitution. The United States Supreme Court established that victims of a constitutional violation by a federal agent have the right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 396 (1971). See also Carlson v. Green, 446 U.S. 14, 18 (1980); Davis v. Passman, 442

U.S. 228 (1979). Nevertheless, defendants move to dismiss plaintiff's Bivens action on three grounds: first, that insofar as plaintiff can obtain the same relief, if at all, under 42 U.S.C. § 1983, he is limited to remedies under that statute; second, neither the LANL defendants nor the Mason & Hanger defendants are "federal agents;" and, third, defendants are entitled to qualified, or "good faith" immunity for their conduct in reasonably relying on a valid governmental regulation, thus barring plaintiff's Bivens action.

First, defendants argue that plaintiff's claim for relief under 42 U.S.C. § 1983 (Count III) precludes his action directly under the Constitution in Count IV. The conduct forming the basis for plaintiff's claim in Count III also forms the basis of his claim in Count IV; the relief sought in Count III is identical to the relief sought in Count IV; the constitutional rights alleged by plaintiff to have been violated in Count III are reiterated in Count IV. The only difference between the two counts is plaintiff's characterization of the parties as federal actors in Count IV. Nevertheless, plaintiff has properly plead [sic] a Bivens cause of action in Count IV.

In Carlson v. Green, supra, the United States Supreme Court ruled that a Bivens action was properly brought, despite the availability of a cause of action under the Federal Tort Claims Act. In determining that the FTCA did not provide an exclusive remedy, the Court required an "explicit congressional declaration" that the remedy was intended to be exclusive. Id. at 19. In the present case, there is similarly no evidence that Congress intended the remedy created in 42 U.S.C. § 1983 to be exclusive. Although it is clear that plaintiff may not recover twice for the same injury alleged in Counts III and IV of his Complaint, he has properly stated a Bivens action, and such action will be not be precluded by his cause of action under section 1983.

Second, defendants claim that plaintiff's cause of

action under the Constitution must fail because neither the LANL defendants nor the Mason & Hanger defendants are "federal agents." Defendants do not dispute that the DOE defendants are federal agents. Plaintiff alleges a conspiracy between all the defendants to deprive him of his constitutional rights. Therefore, under the analysis of Adickes v. Kress & Co., supra, see Part II, supra, when state actors jointly engage with federal actors in the prohibited action, the state actors are "federal actors" for purposes of the Bivens cause of action. It is not necessary that every participant in the allegedly unconstitutional conduct be a federal agent to state a valid Bivens action, just as it is not necessary that every actor be a state actor for an action under section 1983. It is sufficient that the state actors be willful participants in joint activity with the federal agents.

Finally, defendants contend that they are entitled to qualified immunity, under Harlow v. Fitzgerald, supra, because of their reasonable reliance on a valid regulation. As in the analysis of this defense with respect to plaintiff's section 1983 claim, however, defendants have produced no evidence of their reliance on IMD 6102. Defendants' motion to dismiss Count IV is, therefore, without merit and will be denied.

IV. Defendants' Claim of Eleventh Amendment Immunity

Defendants move to dismiss plaintiff's complaint, claiming that they are immune from liability under the Eleventh Amendment.[2] Suit against the State and agencies of the State is barred by the Eleventh Amendment unless the State has consented to the filing of such a

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[2] Although only LANL has raised the defense of immunity under the Eleventh Amendment, this Court will consider the defense as it applies to all of the defendants, because an Eleventh Amendment defense is jurisdictional. Garcia v. Board of Education of the Socorro Consolidated School District, 777 F.2d 1403, 1405 (10th Cir. 1985).

suit. Alabama v. Pugh, 438 U.S. 781, 782 (1978). "This jurisdictional bar applies regardless of the nature of the relief sought." Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100 (1984).

The Regents of the University of California are organized under the laws of the State of California. Cal.Const., Art. IX, § 9(a). Although the State of California is not a named defendant in this action, state agencies or individual officials may be protected by the State's Eleventh Amendment immunity "when the action is in essence for the recovery of money from the state[.]" Quern v. Jordan, 440 U.S. 332, 345 n. 17 (1979). As this Court stated in Johnson v. Regents of the University of California, No. Civ 82-139 HB, slip op. at 3 (D. N.M. July 21, 1982), "[s]everal courts have analyzed those 'powers, characteristics and relationships created by state law' and have concluded that the Regents of the University of California is an 'arm of the state,' immune from suit under the Eleventh Amendment." (quoting Vaughn v. Regents of the University of California, 504 F.Supp. 1349, 1352 (E.D. Cal. 1981). See also Moxley v. Vernot, 555 F.Supp. 554, 560 (S.D. Ohio 1982); Selman v. Harvard Medical School, 494 F.Supp. 603, 615 (S.D.N.Y.), aff'd mem., 636 F.2d 1204 (2d Cir. 1980).

By extension, LANL is also an arm of the state for purposes of Eleventh Amendment immunity, because all obligations incurred by LANL are paid by the Regents pursuant to the Regents' contract with the DOE. Exhibit A, Brief in Support of Defendants' Motion to Dismiss the First Amended Complaint and for Summary Judgment, 8-9. Defendants' motion to dismiss will, therefore, be granted as to the Regents and LANL. Although the Eleventh Amendment also bars suits for retroactive relief against individuals in their official capacities, Edelman v. Jordan, supra at 666-67, and Counts III and IV of plaintiff's Complaint seek retroactive relief in the form of compensatory and punitive damages, defendants'

motion to dismiss will be denied as to the LANL defendants Donald Kerr, Robert Pogna and Ed C. Walterscheid, who were sued in their individual capacities only. Ex Parte Young, 209 U.S. 123 (1908).

V. Defendants' Claim of Sovereign Immunity

The DOE defendants (DOE, Donald Paul Hodel, and Gary Granere) move to dismiss plaintiff's complaint, claiming that they are immune from liability under the doctrine of sovereign immunity. It is well-settled that the United States, as a sovereign, is immune from suit unless it consents to be sued. United States v. Sherwood, 312 U.S. 584, 586 (1941). Furthermore, a suit against a federal agency or a federal employee will be deemed a suit against the United States "if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." Dugan v. Rank, 372 U.S. 609, 620 (1963) [citations omitted.]

In Counts III and IV, plaintiff seeks compensatory and punitive damages from the DOE defendants. Donald Paul Hodel and Gary Granere are sued in their official and individual capacities. A suit against government employees in their official capacities is essentially a suit against the United States. Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985). Therefore, insofar as plaintiff seeks monetary damages against the DOE and Donald Paul Hodel and Gary Granere in their official capacities, his suit is barred by the sovereign immunity of the United States. See Land v. Dollar, 330 U.S. 731, 738 (1947).

Congress has, however, consented to suits for injunctive relief brought against federal agencies, or federal employees. 5 U.S.C. § 702 (1976). Section 702 eliminates the defense of sovereign immunity in actions for specific, non-monetary relief. Ghandi v. Police Depart-

ment of the City of Detroit, 747 F.2d 338, 343 (6th Cir. 1984). See also Ogden v. United States, 758 F.2d 1168, 1177 (7th Cir. 1985). In Count II of his Complaint, plaintiff seeks injunctive relief. His action in Count II against the Doe defendants is not, therefore, barred by sovereign immunity.

Finally, insofar as plaintiff seeks monetary damages from Donald Paul Hodel and Gary Granere in their individual capacities, his action is not barred by sovereign immunity. See New Mexico v. Regan, 745 F.2d 1318, 1320 (10th Cir. 1984, cert. denied, 53 U.S.L.W. 3776 (U.S. Apr. 29, 1985). "The doctrine of sovereign immunity is not a bar to such an action since the judgment need not be satisfied by the public treasury." Newhouse v. Probert, 608 F.Supp. 978, 981 (W.D. Mich. 1985). Therefore, the DOE defendants' motion to dismiss on the grounds of sovereign immunity will be granted insofar as plaintiff seeks monetary damages against the DOE and Donald Paul Hodel and Gary Granere in their official capacities, and denied insofar as plaintiff requests injunctive relief. The motion will also be denied insofar as plaintiff seeks monetary relief against Donald Paul Hodel and Gary Granere in their individual capacities.

VI. Plaintiff's Challenge to IMD 6102

Defendants move for summary judgment as to Count II of plaintiff's complaint, which alleges that the DOE regulation Interim Management Directive No. 6102 is unconstitutional. IMD 6102 provides medical standards for various protective personnel, including security inspectors, and compliance with these standards by personnel hired by Mason & Hanger is mandated by the DOE. Affidavit of Alfredo DeVargas, filed May 16, 1985, Exhibits 2, 4 and 5. The regulation provides that "[a] one-eyed individual shall be medically disqualified for security inspector duties." IMD 6102 § A 6 b (8), Exhibit 4, First Amended Complaint. Defendant Hook, Administrative Manager for Mason & Hanger, cited IMD 6102

as the reason for his rejection of plaintiff's application for employment in his letter to plaintiff dated November 24, 1981. Affidavit of Alfredo DeVargas, filed May 16, 1985, Exhibit 1.

Plaintiff challenges the constitutionality of IMD 6102 on three grounds. First, plaintiff claims that the regulation violates Section 504 of the Rehabilitation Act. Section 504, however, is inapplicable in this context. That section applies only to recipients of "federal financial assistance," as discussed in Part I, supra. Although IMD 6102 regulates personnel hired by Mason & Hanger, Mason & Hanger is paid pursuant to a procurement contract with LANL, not "federal financial assistance." Therefore, Section 504 does not apply to IMD 6102 medical standards for security personnel provided to LANL by Mason & Hanger.

Plaintiff also claims that IMD 6102 violates his rights to the equal protection of the laws guaranteed by the Fifth Amendment. The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. Const. Amend. V. "In numerous decisions, this Court has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws." Davis v. Passman, supra at 234. Plaintiff contends that IMD 6102 is unconstitutional because it discriminates against the handicapped.

Handicapped persons do not constitute a suspect class for purposes of established equal protection analysis. Brown v. Sibley, 650 F.2d 760, 766 (5th Cir. 1981). Furthermore, there is no fundamental constitutional right to employment. Coleman v. Darden, 595 F.2d 533, 538 (10th Cir.), cert. denied, 444 U.S. 927 (1979). Therefore, in the absence of a suspect classification and a fundamental right, the only inquiry is whether the classification scheme embodied in IMD 6102 is rationally related to the objectives of the governmental agency (the DOE).

"The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the [agency's] objective." McGowan v. Maryland, 366 U.S. 420, 425 (1961).

The security inspectors regulated by IMD 6102 are required to operate vehicles, communication systems, alarm systems, weapons and riot control equipment, among many other duties connected with protecting classified material and special nuclear material at Los Alamos Laboratory. Affidavit of Alfredo DeVargas, filed May 16, 1985, Exhibit 2. Congress' concern about the protection of nuclear and classified material from terrorists [sic] attack and other hazards is documented in the Proceedings Before the Subcommittee on Procurement and Military Nuclear Systems of the Committee on Armed Services of the United States House of Representatives, on January 9, 1981, Exhibit C., Brief in Support of Defendants' Motion for Summary Judgment, pp. 17-18, 23-25, 30 (dialogue between Congressman Daniel and Thomas R. Clark, Deputy Manager, Albuquerque Operations Office, DOE). The DOE's underlying assumption that sight is required for certain of the skills demanded of security inspectors at LANL cannot be said to be irrational; as in Brown v. Sibley, supra, the DOE "reasonably could assume that a sighted person could more safely and proficiently perform those skills than could one with a disabling visual impairment." IMD 6102 is rationally related to legitimate governmental goals, and is, therefore, constitutional. Defendants' motion for summary judgment as to plaintiff's Count II claim that IMD 6102 is facially unconstitutional will, therefore, be granted.

Finally, plaintiff claims that even if IMD is facially constitutional, it is unconstitutional as applied to him. He bases this contention on Mason & Hanger's failure to follow the discretionary procedures outlined in IMD 6102 § A 6 c, which provides:

> Despite an initial indication of medical disqualification, examinees may be considered for medical qualification when, in the judgment of the designated physician, a thorough history, supplemental physical examination and other appropriate laboratory test [sic] and medical investigative procedures indicate that the examinee can safely and effectively perform all normal and emergency job duties; and provided that the designated physician determines that all such duties are within the physical capability and exercise tolerance of the examinee.

Defendants stipulate that the above procedures were not followed in plaintiff's case. Reply Brief of all Defendants in Support of their Motion to Dismiss the First Amended Complaint and for Summary Judgment, 5. They acknowledge that plaintiff did not see a doctor before he was medically disqualified for the position of security inspector. Id. at 26. Although defendants argue that the above procedures are applicable only when an initial indication of a disqualifying condition is "medically in error," id., the language of the regulations does not limit review to medical errors.

Defendants claim, however, that they are entitled to qualified, or "good faith" immunity, for their reasonable reliance on a valid regulation. See Harlow v. Fitzgerald, supra at 817-19. In Count II, plaintiff seeks primarily prospective injunctive and declaratory relief; he requests a declaration that IMD 6102 is facially unconstitutional, or unconstitutional as applied to him, and requests an injunction requiring Mason & Hanger to process his application for employment and to hire him if he passes the proper criteria for a security inspector. Immunity does not bar a request for prospective injunctive relief. Pulliam v. Allen, 466 U.S. 522, 541-42 (1984). It is un-

necessary, therefore, to determine whether defendants are entitled to qualified immunity in this context.

Insofar as plaintiff also requests retroactive relief in the form of a request for back pay in Count II, defendants' claim of qualified immunity is not barred. Nevertheless, defendants have produced no evidence showing reasonable reliance on a valid regulation. Although counsel for defendants argue that defendants reasonably relied on IMD 6102 in denying employment to the plaintiff, the arguments of counsel are not evidence. Defendants' Motion to Dismiss Plaintiff's Count II claim that IMD 6102 is unconstitutional as applied to him will, therefore, be denied.

VII. Defendant Granere's Motion to Dismiss and/or Summary Judgment

Defendant Granere moves to dismiss plaintiff's third cause of action, or, in the event matters outside the pleadings are considered, for summary judgment as to Count III. Defendant Granere contends that his motion should be granted for either of two reasons: first, because plaintiff has failed to allege specific facts supporting his claim of a constitutional violation by the defendant; and, second, because defendant Granere is entitled to qualified immunity under Harlow v. Fitzgerald, supra. Defendant's arguments lack merit, and his motion, therefore, will be denied.[3]

Defendant argues that plaintiff has failed to make a prima facie showing of unconstitutional conduct by defendant Granere, and that plaintiff has, therefore, failed to state a claim under 42 U.S.C. § 1983. Defendant cor-

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[3] In his Reply Brief in Support of Motion to Dismiss, defendant Granere also contends for the first time that plaintiff has failed to exhaust his administrative remedies, as required under Executive Order 11246. Because plaintiff has not been afforded the opportunity to respond to this argument, it will not be addressed by this Court.

rectly states that mere conclusory allegations are not sufficient to state a claim under 42 U.S.C. § 1983. See Taylor v. Nichols, 558 F.2d 561, 566 (10th Cir. 1977). Nevertheless, plaintiff's complaint is sufficiently specific to withstand defendant's motion to dismiss.

In Count III, plaintiff alleges that defendant Hook falsely stated that persons with only one eye were automatically medically disqualified from employment as security inspectors. ¶ 39, Amended Complaint. He also alleges that defendant Hook acted beyond his authority as a supervisor in making the determination of medical disqualification, and thereby acted in violation of federal regulations. Id. Plaintiff alleges that defendant Granere and the other defendants authorized, acquiesced or ratified the above conduct. Id. at ¶ 40. Plaintiff also alleges that defendant Granere, and the other DOE and LANL defendants, authorized, acquiesced, or ratified employment discrimination against persons on the basis of their Spanish-American ancestry, physical handicap, age, and sex. Id. at ¶ 41. Plaintiff further alleges that the defendants authorized, acquiesced, or ratified the decision to bar the plaintiff from employment on the alleged basis of his handicap, while aware of plaintiff's association with his brother, and his brother's outspoken political views. Id. at ¶ 42. Plaintiff also alleges that defendant Granere conspired with the other defendants to deprive plaintiff of his First, Fifth, and Fourteenth Amendment rights. Id. at ¶ 43. Plaintiff alleges that the defendants were acting pursuant to a policy or custom and course of conduct condoning discrimination. Id. at ¶ 44. Finally, plaintiff alleges that defendant Granere failed to adequately supervise the Mason & Hanger and LANL defendants and their employees not to engage in discriminatory conduct, id. at ¶ 46, and that defendant's actions were intentional and willful. Id. at ¶ 45.

Defendant Granere acknowledges that he was Acting Area Manager of the DOE Los Alamos Area Office

when plaintiff applied for employment with Mason & Hanger. Granere Declaration, Motion of Gary Granere to Dismiss, or in the alternative, for Summary Judgment. The Area Manager is responsible for having knowledge of such staff specializations as personnel, Attachment 1, Motion of Gary Granere to Dismiss, and "directs an organization essential to adequately fulfill all DOE responsibilities involved in the support of the Los Alamos Scientific Laboratory activities and the necessary related . . . personnel . . . services." Id. Furthermore, the Deputy Area Manager is responsible for administering subcontract operations, and is jointly responsible for directing all activities of the Area Office, including related personnel operations. Attachment 2, Motion of Gary Granere to Dismiss, 2.

Plaintiff has alleged the actions of defendant Hook with specificity. See Plaintiff's Amended Complaint, ¶ 39. His allegations that defendant Granere authorized, acquiesced or ratified those actions are, therefore, sufficiently specific to withstand defendant Granere's motion, particularly since it is undisputed that the defendant was responsible for overseeing Mason & Hanger's actions as part of his responsibility for the activities of subcontract operations.

Defendant Granere also contends that he is entitled to qualified, or "good faith" immunity, because any act which he might have committed was carried out within the scope of his official, discretionary duties. Although defendant correctly points out that qualified immunity may be accorded to government officials performing discretionary functions, such immunity is only available insofar as the officials' conduct "does not violate clearly establish [sic] statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, supra at 818. In this case, plaintiff alleges a deprivation of his constitutional rights not to be discriminated against because of handicap, national origin, or as-

sociation. These are established constitutional rights. In this case, defendant "could be expected to know that certain conduct would violate . . . constitutional rights," id. at 819, so the Harlow doctrine of qualified immunity is inapplicable. Defendant's motion to dismiss is, therefore, without merit and will be denied.

VIII. Various Other Motions

Finally, the parties made four other motions which are readily disposed of. First, the DOE and the Regents move to dismiss the fictitious defendants, or to strike all allegations concerning the fictitious defendants. Plaintiff's Amended Complaint names John Does One and Two, employees of the Department of Energy, and Richard Roes One and Two, employees of LANL. Plaintiff agrees that he has no intention of naming any other individuals as parties to this lawsuit. Defendants' motion, therefore, shall be granted, by agreement of the parties.

Second, defendants filed a Supplemental Motion to Dismiss all claims under the Federal Rehabilitation Act of 1973, on the grounds that plaintiff has failed to exhaust his administrative remedies. This Court has already granted defendants' Motion for Summary Judgment as to plaintiff's claim under the Rehabilitation Act, see, Part I, supra. Defendants' motion will, therefore, be denied as moot.

Third, the United States moves to dismiss this action against Donald Paul Hodel in his individual capacity, for lack of personal jurisdiction and/or insufficiency of service of process. This motion is well-taken. Plaintiff concedes that he was unable to document service upon defendant Hodel in his individual capacity. Plaintiff's claim against defendant Hodel in his individual capacity, therefore, shall be dismissed.

Finally, plaintiff moves for relief pursuant to Fed. R. Civ. P. 56(f). Specifically, plaintiff requests this Court to

order a continuance to permit plaintiff to undertake limited discovery on the issues raised by defendants' Motion for Summary Judgment. Plaintiff's motion is not well-taken. This Court has already denied a virtually identical motion by the plaintiff. See DeVargas v. Mason & Hanger-Silas, Civ. No. 83-1674, slip op. at 6 (D. N.M. May 6, 1985). Plaintiff may not seek to avoid this Court's Order by restating a motion for discovery, when further discovery has been abated, pending a ruling on the motions presently before this Court. Furthermore, plaintiff seeks additional discovery for the purpose of proving that Mason & Hanger is the recipient of "federal financial assistance." In light of the disposition of plaintiff's claim under the Rehabilitation Act in Part I, supra, such further factual development is unnecessary. Plaintiff's motion for Rule 56(f) relief, therefore, will be denied.

Now, Therefore,

IT IS BY THE COURT ORDERED that:

(1) defendants' Motion for Summary Judgment shall be granted as to Count I of Plaintiff's Complaint, seeking relief under section 504 of the Rehabilitation Act of 1973;

(2) defendants' Motion for Summary Judgment shall be granted insofar as plaintiff relies on a violation of section 504 of the Rehabilitation Act as part of his claim in Count III under 42 U.S.C. § 1983, but denied as to the remainder of plaintiff's section 1983 claim in Count III;

(3) defendants' Motion to Dismiss plaintiff's Bivens action in Count IV shall be denied;

(4) defendants' Motion to Dismiss on the basis of Eleventh Amendment immunity shall be granted as to the Regents and LANL, and denied as to the other defendants;

(5) defendants' motion to dismiss on the basis of sovereign immunity shall be granted as to the Department of Energy, and Donald Paul Hodel and Gary Granere in their official capacities insofar as plaintiff seeks compensatory and punitive damages, but denied insofar as plaintiff seeks injunctive relief;

(6) defendants' Motion for Summary Judgment as to plaintiff's constitutional challenge to Interim Management Directive 6102 shall be granted insofar as plaintiff claims that the directive is facially unconstitutional, and denied insofar as plaintiff alleges that the regulation was unconstitutional as applied to him;

(7) defendant Gary Granere's motion to dismiss shall be denied;

(8) defendants DOE and the Regents' motion to dismiss the fictitious defendants shall be granted;

(9) defendants' Supplemental Motion to Dismiss all claims under the Rehabilitation Act shall be denied as moot;

(10) defendant Donald Paul Hodel's motion to dismiss for insufficiency of service of process shall be granted;

(11) and plaintiff's motion for Rule 56(f) relief shall be denied.

s/s
Chief Judge

[Filed April 9, 1986]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ALFREDO DeVARGAS,

Plaintiff,

vs. CV No. 83-1674 HB

MASON & HANGER-SILAS MASON CO., INC.; T. R. HOOK, individually and in his official capacity; DON HARDWICK, individually and in his official capacity; THE UNITED STATES DEPARTMENT OF ENERGY, DONALD PAUL HODEL, individually and in his official capacity; GARY GRANERE, individually and in his official capacity; LOS ALAMOS NATIONAL LABORATORY; REGENTS OF THE UNIVERSITY OF CALIFORNIA; DONALD KERR, in his individual capacity; and ED C. WALTERSCHEID, in his official capacity,

Defendants.

JUDGMENT

This matter having come before the Court on defendants' motion to dismiss on the basis of Eleventh Amendment immunity, and the court having entered its memorandum opinion finding that the motion should be granted;

Now, Therefore,

IT IS BY THE COURT ORDERED that judgment

is hereby entered in the above-captioned case in favor of defendants Los Alamos National Laboratory and Regents of the University of California.

s/s
Chief Judge

[Filed April 9, 1986]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ALFREDO DeVARGAS,

Plaintiff,

vs. CIV No. 83-1674 JP

MASON & HANGER-SILAS MASON CO., INC.; T. R. HOOK; DON HARDWICK; THE UNITED STATES DEPARTMENT OF ENERGY; JOHN S. HERRINGTON; GARY GRANERE; DONALD KERR; ROBERT POGNA; and ED C. WALTERSCHEID,

Defendants.

MEMORANDUM OPINION AND ORDER

The subject of this memorandum opinion is defendants' Motion to Dismiss the Second Amended Complaint and for Summary Judgment. Having reviewed the motion, the memoranda and exhibits submitted by the parties, and having consulted the applicable authorities, I conclude that defendants' motion should be granted.

This is a civil rights action arising out of the refusal by defendants Mason & Hanger-Silas Mason Co., Inc. and its employees, T. R. Hook and Don Hardwick ("the Mason & Hanger defendants"), to consider plaintiff's application for a position as security inspector at the Los Alamos National Laboratory ("LANL") facilities in Los Alamos, New Mexico. Mason & Hanger is a private corporation that employs individuals as security inspectors at LANL pursuant to a subcontract with LANL. Under a contract between the United States Department of Energy ("DOE") and the Regents of the University of California, LANL was organized to engage in weapons

and atomic energy research.

Plaintiff has only one eye. He unsuccessfully applied for employment at Mason & Hanger in November, 1981 and again in 1983. The Mason & Hanger defendants refused to process plaintiffs' [sic] employment application, relying on a then-applicable DOE regulation, Interim Management Directive No. 6102 Appendix IV (IMD 6102), which provided that "[a] one-eyed individual shall be medically disqualified for security inspector duties." IMD 6102 § A 6 b (8). Plaintiff sued under both 42 U.S.C. § 1983 and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 396 (1971), alleging that the refusal to hire him violated his civil rights. Plaintiff sought damages, and injunctive and declaratory relief.

The procedural history of this case is somewhat complex. In October, 1986 Judge Bratton, the judge to whom this case was then assigned, granted summary judgment on the issue of qualified immunity in favor of the remaining DOE and LANL defendants[1] as to plaintiff's claim for damages. Judge Bratton denied the motion for summary judgment as to defendants Hook, Hardwick and Mason & Hanger, ruling that private parties were not entitled to assert the defense of qualified immunity. Defendants sought interlocutory review of the denial of qualified immunity under Mitchell v. Forsyth, 472 U.S. 511 (1985), and the Tenth Circuit Court of Appeals reversed. DeVargas v. Mason & Hanger-Silas Mason Co., Inc., 844 F.2d 714 (10th Cir. 1988) (De-

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[1] Judge Bratton had previously dismissed plaintiff's claims against the Regents and LANL on the ground that they were entitled to immunity under the Eleventh Amendment. He also dismissed plaintiff's damages claims against DOE and the DOE defendants who had been sued in their official capacities, because those claims were barred by the doctrine of sovereign immunity. Judge Bratton did not dismiss claims for declaratory and injunctive relief brought against the DOE and LANL defendants in their individual capacities.

Vargas). The court of appeals held that the defense of qualified immunity was available to private party defendants who acted in accordance with the duties imposed by a contract with a governmental body, 844 F.2d at 722, and determined that defendants Hook, Hardwick and Mason & Hanger were entitled to qualified immunity because they did not violate a "clearly established right" of which a reasonable defendant would be aware. Id. at 724. The court of appeals remanded "for trial on such equitable claims as remain before the district court." Id. at 725.

Three days before the Tenth Circuit handed down its decision, I granted plaintiff's motion for leave to file a Second Amended Complaint. Plaintiff's Second Amended Complaint asserts a new theory of liability under 42 U.S.C. § 1983 based on an alleged violation of section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793. In addition, plaintiff has amended his claim for declaratory and injunctive relief, and "clarified" the Fourteenth Amendment claims previously asserted under 42 U.S.C. § 1983. All of the defendants join in the present motion to dismiss the Second Amended Complaint and for summary judgment on all claims contained in the Second Amended Complaint. Because I find that defendants are entitled to qualified immunity as to plaintiff's claims for damages, and plaintiff's remaining claims for declaratory and injunctive relief either fail to state a claim or are premature, defendants' motion will be granted.

I. Qualified Immunity

The defense of qualified immunity, as articulated by the United States Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), provides that government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." As discussed

above, the Tenth Circuit ruled in DeVargas that this defense was available to the private party defendants in this case. Plaintiff argues that the Tenth Circuit's ruling is not dispositive of the present motion, because the Tenth Circuit did not address the applicability of the defense of qualified immunity to plaintiff's claim under 42 U.S.C. § 1983 based on a violation of section 503 of the Rehabilitation Act. It is true that the Tenth Circuit did not decide whether qualified immunity barred plaintiff's action for damages under 42 U.S.C. § 1983 based on a violation of section 503 of the Rehabilitation Act. DeVargas, 844 F.2d at 725 n. 23. Nevertheless, the Tenth Circuit's reasoning applies equally well to plaintiff's present claim, and necessitates the same result.

Section 503 of the Rehabilitation Act mandates that all contracts in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services for the United States shall contain a provision requiring that, in employing persons to carry out such contract, the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals. Plaintiff contends that under section 503 and its implementing regulations, a government contractor could not discriminate against an otherwise qualified handicapped applicant for employment on the basis of his handicap. Therefore, plaintiff argues that defendants violated clearly established law when they denied his application for employment because he had the handicap of lacking one eye.

Plaintiff's argument fails for any of three reasons. First, it cannot be said that section 503 "clearly established" an individual's right to affirmative action in his or her particular case. Indeed, every circuit court that has addressed the question has concluded that no private right of action exists to enforce section 503. See Hodges v. Atchison, Topeka and Santa Fe Railway Co., 728 F.2d

414 (10th Cir.), cert. denied, 469 U.S. 822 (1984); D'Amato v. Wisconsin Gas Co., 760 F.2d 1474 (7th Cir. 1985); Painter v. Horne Brothers, Inc., 710 F.2d 143 (4th Cir. 1983); Davis v. Ohio Barge Line, Inc., 697 F.2d 549 (3rd Cir. 1983); Davis v. United Air Lines, Inc., 662 F.2d 120 (2d Cir. 1981), cert. denied, 456 U.S. 965 (1982); Fisher v. City of Tucson, 663 F.2d 861 (9th Cir. 1981), cert. denied, 459 U.S. 881 (1982); Simon v. St. Louis County, Missouri, 656 F.2d 316 (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982); Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir.), cert. denied, 449 U.S. 889 (1980); Hoopes v. Equifax, Inc., 611 F.2d 134 (6th Cir. 1979). Plaintiff points to no statutory or regulatory language explicitly conferring the right to affirmative action on individuals. Instead, plaintiff relies on "congressional policy" to hire the handicapped. As the Tenth Circuit stated in Devargas, [sic] however, "such a policy statement cannot constitute a 'clearly established rule of law,' the violation of which would foreclose immunity." 844 F.2d at 725 n. 23.

Second, even if section 503 "clearly established" an individual's right to affirmative action in a particular case, this right was not clearly established at the time of plaintiff's applications for employment in 1981 and 1983. Plaintiff implicitly acknowledged the prior unavailability of a direct cause of action under section 503 when he sought to amend his complaint to add his claim under 42 U.S.C. § 1983 based on a violation of section 503, "in view of the recent United States Supreme Court decision in Wright v. Roanoke Redevelopment & Housing Authority," 479 U.S. 418 (1987). (Plaintiff's Memorandum of Points and Authorities in Response to Defendants' Motion for Partial Dismissal, to Strike Certain Allegations and for Partial Summary Judgment on the Proposed Second Amended Complaint, at 6). Since even plaintiff acknowledged by implication that his cause of action under 42 U.S.C. § 1983 for a violation of section 503 became viable, if at all, only after a 1987 decision by

the United States Supreme Court, it cannot be said that an individual's right to affirmative action in employment by a government contractor was "clearly established" as early as 1981 or 1983. See Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 645 (10th Cir. 1988) (the district court must examine the law as it was at the time of the defendants' actions).

Finally, the question is not whether plaintiff's rights under section 503 were clearly established, but instead, whether the "contours" of plaintiff's rights under section 503 were "sufficiently clear" that defendants would reasonably understand that their reliance on IMD 6102 in denying plaintiff's employment application violated those rights. See Anderson v. Creighton, 107 S.Ct. 3034, 3039 (1987). By emphasizing his asserted right to affirmative action in employment rather than defendants' application of IMD 6102 to plaintiff's request for employment, plaintiff misconstrues the nature of the inquiry relevant to qualified immunity. The proper inquiry examines the allegedly unlawful conduct, and asks whether that conduct was objectively reasonable, "as measured by reference to clearly established law." Harlow, 457 U.S. at 818. Plaintiff's approach would convert the rule of qualified immunity "into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. Harlow would be transformed from a guarantee of immunity into a rule of pleading." Anderson, 107 S.Ct. at 3039.

Once the inquiry is focused under the principles of Harlow and Anderson, the analysis follows that of the Tenth Circuit in DeVargas. Plaintiff does not dispute that defendants relied on IMD 6102's mandatory disqualification of one-eyed individuals in rejecting plaintiff's application to be a security inspector at LANL.[2] The

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[2] Plaintiff has not complied with D.N.M. R. 9(j)(2), which requires a memorandum in opposition to a motion for summary judgment to (continued...)

Tenth Circuit upheld defendants' interpretation of IMD 6102 in DeVargas. Furthermore, the Tenth Circuit held that IMD 6102 did not violate plaintiff's equal protection rights because the regulation was rationally related to legitimate governmental concerns of protecting classified information and nuclear material at LANL. 844 F.2d at 725. For the same reason, defendants' application of IMD 6102 did not violate plaintiff's rights (if any existed) under section 503, because the governmental concerns of protecting classified information and nuclear material at LANL constitute legitimate, nondiscriminatory reasons for refusing to hire one-eyed persons as security inspectors at LANL. Defendants' reliance on IMD 6102 in rejecting plaintiff's application as a security inspector did not violate plaintiff's "clearly established" rights under section 503 and defendants are entitled to qualified immunity as to this claim.

Plaintiff also argues that defendants are not entitled to qualified immunity as to his claim that the manner in which defendants applied IMD 6102 to him deprived him of this right to substantive due process. Plaintiff argues that defendants applied IMD 6102 in a manner which created a conclusive presumption that a class of persons (one-eyed individuals) could not perform job duties. As discussed above, however, the Tenth Circuit upheld defendants' application of IMD 6102 against plaintiff's equal protection challenge, finding that the regulation had a rational basis. Following the same reasoning, defendants' application of IMD 6102 did not violate plaintiff's substantive due process rights, because a substantive due process challenge is analyzed under the rational basis standard unless the statute or regulation

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[2] (...continued)
contain a concise statement of the material facts as to which the party contends a genuine issue exists. Under Local Rule 9(j)(2), all material facts set forth in the statement of the movant "shall be deemed admitted unless specifically controverted."

"trammels fundamental personal rights." Murphy v. Matheson, 742 F.2d 564, 575 (10th Cir. 1984). See also Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124 -25 (1978); Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955). As the Tenth Circuit pointed out, plaintiff has no fundamental constitutional right to government employment. DeVargas, 844 F.2d at 725. Because defendants' application of IMD 6102 was rationally related to legitimate governmental concerns of protecting classified information and nuclear material at LANL, defendants are also entitled to qualified immunity as to plaintiff's claim of a violation of his right to substantive due process.[3]

II. Discrimination on the Basis of National Origin

In plaintiff's Second Amended Complaint, plaintiff alleges that defendant Mason & Hanger engaged in a pattern and practice of discriminating against Hispanics. (Second Amended Complaint, ¶ 34). Plaintiff alleges that the discrimination included, but was not limited to, applying IMD 6102 to Hispanics in a manner different from the way it was applied to non-Hispanics. (Second Amended Complaint, ¶ 34). In support of the motion for summary judgment, Mason & Hanger presented evidence negating discrimination against Hispanics.

Summary judgment is an integral part of the Federal Rules of Civil Procedure, which are intended to "'secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327

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[3] Even if defendants applied IMD 6102 in a manner which created a conclusive presumption, the rational basis test would apply. "An irrebutable [sic] presumption is not per se unconstitutional and does not demand an individualized hearing so long as it is rational." Burlington Northern Railroad Co. v. Department of Public Service Regulation, 763 F.2d 1106, 1113 (9th Cir. 1985) (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 22-24 (1976) and Weinberger v. Salfi, 422 U.S. 749, 768-70 (1975)).

(1986)(quoting Fed. R. Civ. P. 1). A motion for summary judgment may be granted only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Although the material submitted by the parties in support of and in opposition to the motion must be construed liberally in favor of the party opposing the motion, Harsha v. United States, 590 F.2d 884, 887 (10th Cir. 1979), the burden on the moving party may be discharged by demonstrating the absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 324. In such a situation, the moving party is entitled to judgment as a matter of law, "because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Id. at 322.

In response to Mason & Hanger's evidence negating discrimination against Hispanics, plaintiff failed to present any evidence creating a genuine issue of material fact in opposition to the motion for summary judgment. Therefore, under the standard established in Celotex, Mason & Hanger is entitled to summary judgment on plaintiff's claim of discrimination on the basis of national origin.

III. Declaratory and Equitable Relief

In the Second Amended Complaint, plaintiff seeks judicial declarations that defendants' application of IMD 6102 to him was unconstitutional, that plaintiff was entitled to have his job application processed when it was submitted, and that he had the right to be examined by a physician and to have the determination of his medical qualification made by a physician. Plaintiff also seeks an order requiring Mason & Hanger to process his application and provide backpay for his lost wages from the date his application was rejected in 1981 until the date he is hired. As discussed above, both the Tenth Circuit and I have ruled that defendants' application of IMD

6102 to plaintiff was not unconstitutional. IMD 6102 legitimately prevented defendants from processing plaintiff's job application. Furthermore, the Tenth Circuit stated that "while IMD 6102 A 3 e appears to require a physician to make all medical qualification decisions, such a requirement makes sense only with regard to those medical disqualifications under IMD 6102 A 6 b which require the physician's judgment to determine their presence, or require a review of medical history or diagnosis." 844 F.2d at 725. This language suggests, quite clearly, that plaintiff was not entitled to be examined by a physician or to have had the determination of medical qualification made by a physician. It follows, then, that plaintiff is not entitled to an order requiring defendants to process his application, or to receive backpay for lost wages from the date of his application.

Plaintiff also alleges that the regulations which replaced IMD 6102 in 1984, codified at 40 C.F.R. § 1046 et seq., are currently being applied to plaintiff in an unconstitutional manner because defendant Pogna stated that the new regulations also prohibit Mason & Hanger from employing a one-eyed individual as a security inspector. (Second Amended Complaint, ¶ 62). Plaintiff seeks a declaration that defendants' application of 40 C.F.R. § 1046 et seq. to him is unconstitutional, and that plaintiff is entitled to a waiver of the medical qualification if plaintiff can demonstrate that he can perform all job duties safely and effectively. Plaintiff has not, however, reapplied for employment. Therefore, no revised regulations have as yet been applied to plaintiff, and his action for declaratory and equitable relief based on application of the regulations that superceded IMD 6102 does not present a justiciable controversy. A justiciable controversy "must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227,

240-41 (1937). See also Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941) ("the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality"). Under these standards, plaintiff's request for declaratory relief concerning the hypothetical application to him of the regulations codified at 40 C.F.R. § 1046 et seq. does not present a presently justiciable controversy.

Now, Therefore,

IT IS BY THE COURT ORDERED as follows:

(1) Defendants' motion for summary judgment is granted as to plaintiff's claim against Mason & Hanger of discrimination on the basis of national origin;

(2) Defendants' motion for summary judgment on the basis of qualified immunity is granted as to all remaining requests for damages in plaintiff's Second Amended Complaint;

(3) Defendants' motion for summary judgment as to plaintiff's claims for declaratory and equitable relief arising out of defendants' application of IMD 6102 is granted; and

(4) Defendants' motion to dismiss plaintiff's claims for declaratory and equitable relief arising out of defendants' application of the regulations which replaced IMD 6102 in 1984, codified at 40 C.F.R. § 1046 et seq., is granted.

s/s
District Judge

[Filed December 14, 1988]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ALFREDO DeVARGAS,

Plaintiff,

vs. CIV NO. 83-1674 JP

MASON & HANGER-SILAS MASON CO., INC.; T. R. HOOK; DON HARDWICK; THE UNITED STATES DEPARTMENT OF ENERGY; JOHN S. HERRINGTON; GARY GRANERE; DONALD KERR; ROBERT POGNA; and ED C. WALTERSCHEID,

Defendants.

JUDGMENT

Having entered a Memorandum Opinion and Order granting summary judgment in favor of defendant Mason & Hanger as to plaintiff's claim of discrimination on the basis of national origin, granting summary judgment in favor of all remaining defendants on the basis of qualified immunity as to plaintiff's remaining requests for damages in the Second Amended Complaint, granting summary judgment in favor of all remaining defendants as to plaintiff's claims for declaratory and equitable relief arising out of defendants' application of IMD 6102, and granting defendants' motion to dismiss plaintiff's claims for declaratory and equitable relief arising out of defendants' application of the regulations codified at 40 C.F.R. § 1046 et seq., I find judgment should be entered in favor of all defendants and against plaintiff as to all

of plaintiff's claims, and plaintiff's Second Amended Complaint should be dismissed.

Now, Therefore,

IT IS BY THE COURT ORDERED that judgment is hereby entered in favor of all defendants and against plaintiff as to all claims contained in plaintiff's Second Amended Complaint, and plaintiff's Second Amended Complaint is hereby dismissed with prejudice.

s/s
District Judge

[Filed December 14, 1988]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ALFREDO DeVARGAS,

Plaintiff,

vs. CIV No. 83-1674 JP

MASON & HANGER-SILAS
MASON CO., INC., et al.,

Defendants.

ORDER

This matter comes before the court on the plaintiff's Motion to Alter or Amend Judgment. I have decided to deny the motion after considering the briefs and related authorities. When considering applications for employment relating to national security, rational basis is the applicable standard of review. There is ample evidence in the record, some of which was discussed in the opinion of the Tenth Circuit Court of Appeals, supporting a rational basis for IMD 6102 on which defendants relied to deny plaintiff employment. DeVargas v. Mason & Hanger-Silas Mason Co., Inc., 844 F.2d 714 (10th Cir. 1988). Since IMD 6102 is a constitutional regulation, defendants had a right to rely on it without having to justify their reliance by proving the negative proposition that they were not trying unlawfully to discriminate against plaintiff by applying IMD 6102. Plaintiff came forward with no evidence that defendants applied IMD 6102 in an unconstitutional manner. In this situation no factual issue precluding summary judgment exists. Plaintiff's Motion to Alter or Amend Judgment and his memorandum filed in support of it do not raise new or differ-

ent legal arguments; all of plaintiff's arguments were given careful and due consideration before entry of the judgment on December 14, 1988 dismissing plaintiff's Second Amended Complaint.

IT IS THEREFORE ORDERED that plaintiff's Motion to Alter or Amend Judgment is denied.

s/s
Chief Judge

[Filed February 8, 1989]

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ALFREDO DeVARGAS,	)	
Plaintiff-Appellant,	)	
v.	)	No. 89-2061
MASON & HANGER-SILAS MASON CO., INC.; T.R. HOOK, individually and in his official capacity; DON HARDWICK, individually and in his official capacity; JOHN DOES, One through Three, individually and in their official capacities; LOS ALAMOS NATIONAL LABORATORY; GARY GRANERE, Acting Area Manager-Department of Energy Los Alamos Area Office; REGENTS OF UNIVERSITY OF CALIFORNIA; DONALD KERR, Director, Los Alamos National Laboratory; THE UNITED STATES DEPARTMENT OF ENERGY; ROBERT POGNA, Employee Los Alamos National Laboratory; ED C. WALTERSCHEID, Employee Los Alamos National Laboratory; DONALD PAUL HODEL, Secretary of Department of Energy; and RICHARD ROES, One through Two, Individually and in their official capacities; and JOHN S. HERRINGTON,	)	
Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. No. CIV 83-1674 JP)

Richard Rosenstock (Steven Farber, of Santa Fe, New Mexico, and Philip Davis, Legal Director, New Mexico Civil Liberties Union, of Albuquerque, New Mexico, of counsel, with him on the briefs), of Chama, New Mexico, for the plaintiff-appellant.

Michael E. Robinson (Stuart E. Schiffer, Acting Assistant Attorney General; William L. Lutz, United States Attorney; and John F. Corden, Appellate Staff Civil Division, Department of Justice, Washington, D.C., with him on the brief), Appellate Staff Civil Division, Department of Justice, Washington, D.C., for the federal defendants-appellees.

Joseph E. Earnest (Laurie A. Vogel, of Cherpelis, Vogel & Salazar, of Albuquerque, New Mexico, with him on the brief), Montgomery & Andrews, P.A., of Santa Fe, New Mexico, for the defendants-appellees the University and Mason & Hanger.

Before **TACHA** and **McWILLIAMS**, Circuit Judges, and **CHRISTENSEN**, District Judge.*

TACHA, Circuit Judge.

This civil rights action arises from the refusal of Mason & Hanger-Silas Mason Company, Inc. ("Mason & Hanger") to consider Alfredo DeVargas for a position as a security inspector at the Los Alamos National Labora-

*The Honorable A. Sherman Christensen, District Judge, United States District Court for the District of Utah, sitting by designation.

tory ("LANL") in Los Alamos, New Mexico. The district court granted the defendants' motion for summary judgment, and DeVargas appeals. We affirm.

I.

DeVargas applied for a security inspector position with Mason & Hanger in 1981 and 1983. Pursuant to a contract with the Regents of the University of California ("Regents"), Mason & Hanger supplies security inspectors for LANL. The Regents operate LANL for the Department of Energy ("DOE"), which conducts nuclear weapon and energy research at LANL. The three individual LANL defendants, Donald Kerr, Robert Pogna, and Edward C. Walterscheid ("individual LANL defendants") are employees of the University of California ("University"). Gary Granere, the Acting Area Manager for the DOE's LANL office, is a federal employee.

In 1981, Mason & Hanger and its employees, T.R. Hook and Don Hardwick ("individual Mason & Hanger defendants"), refused to process DeVargas's employment application, relying on a then-applicable DOE regulation, Interim Management Directive No. 6102 § A.6.b.(8) Appendix IV (IMD 6102),[1] which provided that "[a] one-eyed individual shall be medically disqualified for security inspector duties." DeVargas has vision in only one eye. When DeVargas reapplied in 1983, the Mason & Hanger defendants consulted with the individual LANL defendants, who agreed that IMD 6102 constituted a mandatory disqualification of one-eyed persons.

DeVargas filed suit, alleging in his first amended complaint that the defendants violated sections 503 and

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[1] In November 1984, IMD 6102 was superseded by new regulations, which are codified at 10 C.F.R. § 1046 (1989). DeVargas has not reapplied for employment following the promulgation of these new regulations. For this reason the district court ruled that DeVargas lacks article III standing to argue that he is entitled to be hired by the defendants. DeVargas does not appeal this ruling.

504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 794-95, and that the defendants unlawfully discriminated against him on the basis of his ancestry and handicap, in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the fifth and fourteenth amendments, U.S. Const. amends. V, XIV. DeVargas also alleged that the DOE promulgated IMD 6102 in violation of section 504 and the fifth amendment.

On April 9, 1986, the district court granted the defendants' motion for summary judgment on the section 504 and fifth amendment claims. The court dismissed all claims against the Regents and LANL based on their eleventh amendment immunity.[2] The court did not extend eleventh amendment immunity to Kerr, Pogna, and Walterscheid, the LANL defendants, because they were sued only in their individual capacity [sic]. The DOE, Secretary of Energy Donald Paul Hodel, and Gary Granere moved to dismiss all claims for monetary damages based on the defense of sovereign immunity. The court permitted only DeVargas's claims for injunctive, nonmonetary relief to continue against these defendants in their official capacities.[3] See 5 U.S.C. § 702. The court did not dismiss the claims for monetary damages against Hodel and Granere in their individual capacities.

The defendants also raised the defense of qualified immunity against DeVargas's claim that they unlawfully

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[2] Congress subsequently abrogated any Eleventh Amendment defenses to a section 504 claim that is based on conduct occurring after October 21, 1986. See 42 U.S.C. § 2000d-7.

[3] We note that the district court's ruling was not entirely correct. While the district court barred all claims for monetary relief, the bar on recovery of "money damages" contained in 5 U.S.C. section 702 does not include equitable backpay, which is a form of equitable relief, not monetary damages. See Bowen v. Massachusetts, ___ U.S. ___, ___, 108 S. Ct. 2722, 2731-41 (1988). DeVargas, however, does not appeal the district court's ruling on this issue.

discriminated against him on the basis of his ancestry and handicap in violation of 42 U.S.C. section 1983 and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). In October, 1986, the district court ruled that the individual LANL and DOE defendants enjoyed qualified immunity from DeVargas's claims for damages against them in their individual capacities. The court rejected the request of the Mason & Hanger defendants for qualified immunity. Pursuant to an interlocutory appeal, this court reversed, ruling that Mason & Hanger and the individual Mason & Hanger defendants also possess qualified immunity in spite of Mason & Hanger's status as a private corporation. See DeVargas v. Mason & Hanger-Silas Mason Co., Inc., 844 F.2d 714 (10th Cir. 1988) (DeVargas I). We also held that the conduct of the Mason & Hanger defendants did not violate clearly established law under either IMD 6102 or the equal protection clause of the fourteenth amendment.[4] Id. at 724-25. Following remand, the district court permitted DeVargas to file a second amended complaint. The court entered summary judgment against DeVargas's remaining claims on December 14, 1988.

DeVargas limits his appeal to the following arguments: (1) the defendants violated section 504; (2) the trial court erred by refusing to permit further discovery prior to ruling on the section 504 claim; (3) the defendants' application of IMD 6102 deprived DeVargas of his clearly established right to substantive due process of law under the fifth and fourteenth amendments; and (4) the defendants violated 42 U.S.C. section 1983.

II.

We first determine whether the Mason & Hanger

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[4] None of the defendants in this case argue on appeal that they are entitled to a qualified immunity defense from the section 504 claim.

defendants violated section 504, which prohibits discrimination against handicapped persons by "any program or activity receiving federal financial assistance." 29 U.S.C. § 794. The district court granted summary judgment in favor of Mason & Hanger, concluding that liability could not lie against the Mason & Hanger defendants because Mason & Hanger's operations were not programs or activities that received federal financial assistance. DeVargas insists that the available evidence indicates that Mason & Hanger received federal financial assistance.

In our review of grants of summary judgment, we must reverse if there is a genuine issue concerning a material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). We review all legal questions de novo. See Carey v. United States Postal Serv., 812 F.2d 621, 623 (10th Cir. 1987).

The term "financial assistance" is not defined in the Rehabilitation Act. We apply the ordinary meaning of the term and conclude that a [sic] entity receives financial assistance when it receives a subsidy. See Jacobson v. Delta Airlines, Inc., 742 F.2d 1202, 1208-09 (9th Cir. 1984), cert. dismissed, 471 U.S. 1062 (1985).

In determining whether a party has obtained federal financial assistance under section 504, we decline to scrutinize the fair market value of every transaction as if we were article III accountants. See id. at 1210 (outlining practical problems of a test based solely on fair market value). We do not read section 504 to declare that a contractor receives federal financial assistance whenever the contractor negotiates a contract with favorable terms that compensate the contractor at a rate above the fair market value. We agree with the Jacobson court's conclusion that "in determining which programs are subject to the civil rights laws, courts should focus not on market value but on the intention of the government" to give a subsidy, as opposed to government intent to provide compensation. Id. at 1210 (emphasis

added). We conclude that to determine the applicability of section 504, we must determine whether the government intended to give Mason & Hanger a subsidy.

In this case there is little doubt that Congress did not intend to subsidize Mason & Hanger's operations. Prior to the decision to replace the former government guards with private employees, the DOE conducted a study which concluded that the government would save approximately $3.5 million by contracting out guard services. Moreover, the government awarded the contract to Mason & Hanger only after a competitive bidding process. Both of these factors lead us to conclude that there was no governmental intent to give Mason & Hanger a subsidy.

Our conclusion is consistent with departmental regulations. The Department of Energy's implementing regulations state that the provisions of the Rehabilitation Act do not apply to government procurement contracts, see 10 C.F.R. § 1040.2(b)(3) (1985), which are defined as, inter alia, contracts to purchase services from nonfederal sources, see 41 C.F.R. § 1-1.209 (1984) (former provision). Under this regulation, the purchase from Mason & Hanger of nonpersonal services is a procurement contract outside the reach of the Rehabilitation Act.[5] We hold that the district court correctly granted the motion for summary judgment by the Mason & Hanger defendants on the grounds that the security company and its employees do not fall within the ambit of section 504 of the Rehabilitation Act.

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[5] The DOE regulation is in accord with those of other executive agencies. For example, the regulations of the Department of Health and Human Services state that government procurement contracts do not convey financial assistance, while transfers or leases of government property at less than fair market value or for reduced consideration are forms of financial assistance. See 45 C.F.R. § 84.3(h)(1989). See also 28 C.F.R. § 41.3(e)(1989) (Department of Justice regulation).

III.

We next determine whether the district court correctly granted the individual LANL defendants' request for summary judgment on the section 504 claim.[6] DeVargas argues that the individual LANL defendants are liable under section 504 because LANL, an alleged recipient of federal financial assistance, required Mason & Hanger to administer the allegedly discriminatory policy. The contract between the Regents and Mason & Hanger expressly required that Mason & Hanger abide by any applicable federal regulations relating to the security of LANL. One of the applicable regulations was IMD 6102, and DeVargas states that in 1983 the individual LANL defendants informed Mason & Hanger that IMD 6102 mandated that Mason & Hanger not hire DeVargas. DeVargas insists that the individual LANL defendants cannot escape liability for discrimination when they required Mason & Hanger to administer the allegedly discriminatory policy.

The district court rejected DeVargas's argument on the grounds that section 504's ban on "discrimination under any program or activity receiving Federal financial assistance," 29 U.S.C. § 794, was program-specific. Thus, the district court ruled that even if LANL did receive federal financial assistance, the actions of the LANL defendants did not violate section 504 because the particular program that allegedly discriminated against DeVargas was Mason & Hanger, not LANL.

At the time that the district court issued its ruling on DeVargas's 504 claim, the court correctly relied on Con-

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[6] At the outset we note that the individual LANL defendants are now before us only in their individual, as opposed to their official, capacities. Therefore DeVargas cannot obtain equitable backpay from the LANL defendants because government officials acting in their individual capacities cannot perform the official function of awarding backpay. See Lenea v. Lane, 882 F.2d 1171, 1178 (7th Cir. 1989).

solidated Rail Corp. v. Darrone, 465 U.S. 624 (1984), which held that section 504's prohibition on discrimination by a "program or activity receiving Federal financial assistance" extended only to the specific program or activity receiving the federal funds. Id. at 635-36. The Consolidated Rail decision relied on Grove City College v. Bell, 465 U.S. 555 (1984), which held that Title IX's ban on sex discrimination in any "program or activity receiving Federal financial assistance" prohibited discrimination only in the particular program or activity specifically supported by federal funds. Id. at 570-76. On the basis of these decisions, the district court correctly held that section 504 was program-specific. See Niehaus v. Kansas Bar Ass'n, 793 F.2d 1159, 1162-63 (10th Cir. 1986) (section 504 contains a program specificity requirement); Gallagher v. Pontiac School Dist., 807 F.2d 75, 79 -81 (6th Cir. 1986) (holding that under program-specific requirement of section 504, plaintiff must show that he was denied the benefits of a scholastic program receiving federal financial assistance and not just that he was denied the benefits of a program operated by a school system receiving federal financial assistance).

After the district court issued its opinion, however, Congress enacted the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) ("Restoration Act" or "Act"). Congress premised the Restoration Act upon its findings that "certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title VI of the Civil Rights Act of 1964; and (2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered." Restoration Act § 2, 102 Stat. at 28. The Senate report more bluntly states that the purpose of the Restoration

Act is "to overturn the Supreme Court's 1984 decision in Grove City College v. Bell, 465 U.S. 555 . . . ." S. Rep. No. 64, 100th Cong., 2d Sess. 1, reprinted in 1988 U.S. Code Cong. & Admin. News 3-4.

Section four of the Restoration Act added section 504(b) to the Rehabilitation Act, which provides in pertinent part: "For purposes of this section, the term 'program or activity' means all of the operations of -- . . . (2)(A) a college, university or other postsecondary institution . . . ." Restoration Act § 4, 102 Stat. at 29 (emphasis added) (codified at 29 U.S.C. § 794(b)). This language overturns the program-specific interpretation of "program or activity" developed in Grove City and Consolidated Rail. In the context of a university, the term "program or activity" now refers to all of the operations of the university.

DeVargas argues that the passage of the Restoration Act invalidates the district court's reliance on the program-specific interpretation of section 504 that existed prior to enactment of the Restoration Act. DeVargas renews his argument that the individual LANL defendants cannot escape liability under section 504 of the Rehabilitation Act when they required Mason & Hanger to perpetrate discrimination.

A.

It is clear that the individual LANL defendants are not liable under section 504 as interpreted by the Supreme Court in Consolidated Rail prior to the Restoration Act. Therefore, we must decide whether the Restoration Act retroactively applies to this case.

To determine whether the Restoration Act applies retroactively, we look to congressional intent. See Kaiser Aluminum & Chemical Corp. v. Bonjorno, ___ U.S. ___, ___, 110 S. Ct. 1570, 1577 (1990) ("where the congressional intent is clear, it governs"). Our examination of the language and legislative history of the Restor-

ation Act reveals an absence of clear congressional intent that courts retroactively apply the Act's amendments.

We look first to the language of the Restoration Act. See Kaiser, 110 S. Ct. at 1575. The Act states:

> The Congress finds that --
>
> (1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of . . . section 504 of the Rehabilitation Act of 1973 . . . ; and
>
> (2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

See Restoration Act § 2, 102 Stat. at 28 (1988) (emphasis added). The Senate report accompanying the proposed legislation echoes these sentiments:

> II. Purpose
>
> S. 557 was introduced on February 19, 1987, to overturn the Supreme Court's 1984 decision in Grove City College v. Bell, 465 U.S. 555, and to restore the effectiveness and vitality of the four major civil rights statutes that prohibit discrimination in federally assisted programs.
>
> The Grove City ruling severely narrows the application of coverage of Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation

> Act of 1973, and the Age Discrimination Act of 1975.
>
> The purpose of the Civil Rights Restoration Act of 1987 is to reaffirm pre-Grove City College judicial and executive branch interpretations and enforcement practices which provided for broad coverage of the antidiscrimination provisions of these civil rights statutes.

S. Rep. No. 64, 100th Cong., 2d Sess. 2, reprinted in 1988 U.S. Code Cong. & Admin. News 3, 3-4 (footnote omitted; emphasis added). The Senate report also states that: "other cases that were in the formal enforcement stage are still in jeopardy. These are cases where discrimination has been found, voluntary compliance was refused, and recipients are using the Supreme Court's decision [in Grove City College] as a defense against federal enforcement." S. Rep. No. 64, 100th Cong., 2d Sess. 11, reprinted in 1988 U.S. Code Cong. & Admin. News 13.

Considering both the language of the Restoration Act and the Senate report, we find a congressional purpose to overturn Grove City College, but no clear expression of intent regarding retroactive application of the Act's amendments. Unlike other congressional amendments to existing laws enacted by Congress in response to Supreme Court decisions, the Restoration Act contains no statutory language clearly stating that the Act's amendments shall or shall not apply to pending litigation.[7] We also find that the expressed congressional in-

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[7] Compare Restoration Act with Longshore and Harbor Workers' Compensation Act Amendments of 1984 ("LHWCA"), Pub. L. No. 98-426, §§ 5, 28(a), 28(c), 98 Stat. 1639, 1641, 1655 (§ 5 codified as amended at 33 U.S.C. § 905; §§ 28(a), (c) discussed in legislative history notes to 33 U.S.C. § 901) and Handicapped Children's Protection

(continued...)

tent in the Senate report to "restore" section 504 to its pre-Grove City College interpretation reflects unambiguously only Congress's purpose to reverse the Supreme Court's program-specific reading of federal prohibitions on discrimination by programs or activities receiving federal financial assistance. Because we must find clear congressional intent to invoke retroactivity, we cannot read "restore" to mean "retroactively restore," particularly where the effect of such a reading would be to impose substantive liability for actions committed in reliance on Grove City College and its progeny prior to the passage of the Restoration Act in 1988. Contra Leake v. Long Island Jewish Medical Center, 695 F. Supp. 1414, 1416-18 (E.D.N.Y. 1988) (Restoration Act applies retroactively), aff'd, 869 F.2d 130, 131 (2d Cir. 1989) (per curiam); see also Bonner v. Arizona Dep't of Corrections, 714 F. Supp. 420, 422-23 (D. Ariz. 1989) (adopting reasoning of Leake). Nor do we find that the Senate report's concern about potential jeopardy to formal enforcement actions due to the Grove City College decision necessarily re-

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[7] (...continued)
Act of 1986 ("HCPA"), Pub. L. No. 99-372, §§ 2, 5, 100 Stat. 796, 796-97, 798 (§ 2 codified as amended at 20 U.S.C. § 1415(e)(4); § 5 discussed in legislative history notes to 20 U.S.C. § 1415). See also H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 24, reprinted in 1984 U.S. Code Cong. & Admin. News 2774 (§ 5 amendment of LHWCA disapproves Washington Metro. Area Transit Auth. v. Johnson, 467 U.S. 925 (1984), and provides a special effective date so amendment applies to pending cases, thus WMATA will not have precedential effect); Louviere v. Marathon Oil Co., 755 F.2d 428, 430 (5th Cir. 1985) (Congress provided that LHWCA amendment to 33 U.S.C. § 905 shall apply to pending cases); S. Rep. No. 112, 99th Cong., 2d Sess. 2-3, reprinted in 1986 U.S. Code Cong. & Admin. News 1799-1800 (in response to Smith v. Robinson, 468 U.S. 2 (1984), § 2 of the HCPA clarifies Congress's intent that prevailing parents in Education of the Handicapped Act ("EHA") cases be awarded reasonable attorneys' fees, and HCPA also authorizes courts retroactively to award attorneys' fees for civil court actions to parents who prevailed in EHA cases pending or brought after the date of the Smith v. Robinson decision.

quires retroactive application because there is no indication that the violations were not continuing. In any event, an ambiguous statement in the Senate report on the need for action does not amount to the clear intent required to invoke retroactivity. We therefore hold that the statutory language and authoritative legislative history of the Restoration Act do not evidence a clear congressional intent that courts apply retroactively the Act's amendments to section 504 of the Rehabilitation Act.

We recognize that our holding conflicts with the decisions of the Second Circuit in Leake v. Long Island Jewish Medical Center, 869 F.2d 130 (2d Cir. 1989) (per curiam), and the Fifth Circuit in Ayers v. Allain, 893 F.2d 732, reh'g en banc granted, 898 F.2d 1014 (5th Cir. 1990). After scrutinizing these opinions, however, we find their analysis unpersuasive.

The Second Circuit's opinion in Leake affirmed per curiam the reasoning of the district court in leake v. Long Island Jewish Medical Center, 695 F. Supp. 1414 (E.D.N.Y. 1988). See Leake, 869 F.2d at 131. We therefore focus on the district court's opinion in Leake.

Plaintiff Robert Leake sued his employer under section 504 of the Rehabilitation Act. The issue as framed by the district court was "whether the Restoration Act should be applied retroactively to enable plaintiff, who initiated his suit before its passage, to sue." Leake, 695 F. Supp. at 1416.

The Leake district court began its analysis by specifically finding that "the Restoration Act itself does not indicate any intent of Congress for retroactive application." Id. However, the court found some indication of congressional intent that courts were to retroactively apply the Restoration Act in the floor statement of the bill's sponsor, Congressman Edwards, who said "[t]his bill applies to all pending cases . . . ," 134 Cong. Rec. H583

(daily ed. Mar. 2, 1988), and the floor statements of Senators Packwood[8] and Stafford.[9] Leake, 695 F. Supp. at 1416-17. The Leake court then went back to the language of the Restoration Act, which it had previously found to be ambiguous on the retroactivity issue, and focused on the terms "restore" and "clarify." Analogizing to the Second Circuit's analysis of the congressional intent behind these words in Mrs. W. V. Tirozzi, 832 F.2d 748, 755 (2d Cir. 1987) (examining the Handicapped Children's Protection Act of 1986 ("HCPA")), the Leake district court concluded that Congress must have intended the Restoration Act to apply retroactively.

We are not persuaded by the Leake district court's analysis for two reasons. First, Congress's intended meaning and use of the terms "restore" and "clarify" in the HCPA is rooted in the specific context of the HCPA's statutory language and legislative history. We therefore reject the motion that congressional intent for the Restoration Act may be discerned by analogy to a different statute enacted by a different Congress.

Second, where the statutory language of the Restoration Act and the Senate report simply do not address retroactive application of the Act, we refuse to resolve this important issue solely on the basis of the floor statement of Congressman Edwards that the Act was to apply to pending cases. See Brock v. Pierce County, 476 U.S. 253, 263 (1986) ("statements by individual legislators

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[8] During the floor debate to override President Reagan's veto of the Restoration Act, Senator Packwood stated: "all we have done is change the law back to what we thought it was. We have not expanded it beyond what we thought it was." 134 Cong. Rec. S2735 (daily ed. Mar. 22, 1988).

[9] Senator Stafford, an original sponsor of section 504 of the Rehabilitation Act, stated: "[the] institution-wide definition [was] originally intended by legislators." 134 Cong. Rec. S2739 (daily ed. Mar. 22, 1988).

should not be given controlling effect" for purposes of discerning congressional intent); Weinberger v. Rossi, 456 U.S. 25, 35 n.15 ("contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history"). As for the floor statements of Senators Packwood and Stafford, see supra notes 8-9, we find that these remarks do not directly address the retroactivity issue, much less dispose of it. Furthermore, the Leake district court's reliance on Regents of the University of California v. Public Employment Relations Board, ___ U.S. ___, ___, 108 S. Ct. 1404, 1409 (1988), for the proposition that "[c]ongressional intent may be inferred from the statement of a sponsor on the floor," Leake, 695 F. Supp. at 1417, is misplaced, for this rule of statutory construction only applies where the statement is consistent with the statutory language and other legislative history. See Brock, 476 U.S. at 263; see also Regan v. Wald, 468 U.S. 222, 236-38 (1984) (statements of subcommittee hearings, mark up sessions, floor debates, and House and Senate reports cannot overcome plain meaning of statute). In Regents of the University of California, the Court primarily "rel[ied] on the normal meaning of the [statutory] language chosen by Congress," 108 S. Ct. at 1409, and then went on to discuss how this interpretation was consistent with the legislative history, including the statement of a floor sponsor, see id. at 1409-10. In contrast, the floor statement of Congressman Edwards speaks to an issue, retroactive application, which the Leake district court had already determined was not addressed in the statutory language of the Restoration Act. We refuse to rely on such a slender thread to fashion out of whole cloth a cloak of retroactivity for the Restoration Act.

We next turn to the Fifth Circuit's opinion in Ayers v. Allain, 893 F.2d 732 (5th Cir. 1990). In Ayers the plaintiffs alleged that the policies and practices of various Mississippi state officials perpetuated a racially based dual system of public higher education in violation

of the equal protection clause of the fourteenth amendment, U.S. Const. amend. XIV, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. The district court ruled for the defendants on the issue of liability and dismissed the plaintiffs' case. The issue before the Fifth Circuit regarding the plaintiffs' Title VI claim was "whether Grove City controls the outcome of this case or whether the [Restoration Act] legislation applies retroactively." Ayers, 893 F.2d at 754. The Fifth Circuit resolved the issue in favor of retroactivity:

> Retroactive application of a statute is appropriate when Congress enacts the statute to clarify the Supreme Court's interpretation of previous legislation thereby returning the law to its previous posture. This rule flows from two of the Supreme Court's canons of statutory construction. First, subsequent legislation declaring the intent of an earlier statute is entitled to great weight . . . . Second, the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.

Id. at 754-75 (footnotes omitted).

We disagree with the Ayers ruling because it resolves the retroactivity issue based on congressional intent implied from the circumstances motivating Congress to act rather than from the directly relevant statements of Congress in the statute's language or authoritative legislative history. The standard of "clear congressional intent" for the retroactive application of statutes requires articulated and clear statements on retroactivity, not inferences drawn from the general purpose of the legislation. We simply cannot derive a "clear congressional intent" solely from the circumstance that Congress acted to amend existing law in response to a Supreme

Court opinion, particularly where Congress acting under the same motivating circumstances has expressly and specifically stated that its newly enacted amendment was to apply to pending cases. See supra note 7.

Moreover, the logic behind the Fifth Circuit's rule is inconsistent with the constitutional division of authority between Congress and the Supreme Court. Under our view of the separation of powers, it is Congress's prerogative to make the law by enacting legislation. It is, however, "emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); see also The Federalist No. 78, at 116 (A. Hamilton) (H. Commager ed. 1949) ("The interpretation of the laws is the proper and peculiar province of the courts.") (emphasis added). Once the Supreme Court has interpreted a statute, that construction becomes a part of the statute, and the Court's interpretation applies retroactively to pending cases. See infra note 11. This rule of retroactive application of judicial decisions flows directly from the court's function of interpretating [sic] law. Stated simply, what the Court interprets the law as saying is what the law says. Congress, of course, has the power to change the law and may amend the law to comport with either its own or the (perceived) intentions of the Congress which originally enacted the law. These congressional amendments, however, cannot undo the Supreme Court's authoritative construction of the original statute. When a subsequent Congress amends the law in response to the Supreme Court's interpretation, it does not revive the original enacting Congress's interpretation of the statute which existed before the Supreme Court's interpretation. Rather, the result of a subsequent Congress's "restoration" efforts is newly created law. As with any newly enacted legislation, Congress must state clearly its intentions with regard to retroactivity. We therefore disagree with the Fifth Circuit's approach to the extent that it creates a special rule for the situation where Congress

rejects a judicial interpretation; this approach implicitly treats Congress as a court of revision rather than as the law-making branch of the federal government.

There is nothing jurisprudentially unique about the situation where congress amends a statute in response to the Supreme Court's interpretation. Regardless of whether Congress enacts a new law or amends an existing one, our analysis remains the same. We must examine whether Congress clearly and expressly intended the new law to apply retroactively, as shown by statutory language or authoritative legislative history. We will not imply such an intent where Congress chose to remain silent. For us to "imply" intent derogates from Congress's power to determine the retroactive effect of its own laws. Therefore, in the absence of such clear congressional intent, we apply the appropriate Supreme Court precedent setting forth presumptions governing the retroactive application of newly enacted legislation.

C.

Having determined that the language and legislative history of the Restoration Act do not evidence a clear congressional intent for or against its retroactive application, we turn to Supreme Court precedent for guidance. Our research reveals two lines of authority setting forth conflicting presumptions regarding the retroactive application of a newly enacted federal statute where congressional intent is unclear. The court's most recent articulations of these opposing presumptions are found in Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974), and Bowen v. Georgetown University Hospital, ___ U.S. ___, 109 S. Ct. 468 (1988).

Bradley was the product of a protracted class action suit brought to desegregate the Richmond, Virginia school system. The court in Bradley addressed whether an appellate court should retroactively apply an attorneys' fees statute that came into effect during the pen-

dency of the appeal. The district court had awarded attorneys' fees to the plaintiffs based on the court's general equitable powers. After the initial submission of the case to the Fourth Circuit Court of Appeals, but prior to that court's decision, Congress enacted section 718 of Title VII of the Emergency School Aid Act, 20 U.S.C. § 1617, which granted federal courts the authority to award reasonable attorneys' fees in a school desegregation case. The Fourth Circuit held that section 718 could not be applied retroactively to sustain the attorneys' fees award. The Supreme Court reversed, holding that "a court is to apply the law in effect at the time it renders its decision . . . ." Bradley, 416 U.S. at 711.[10]

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[10] To soften the potentially harsh impact of Bradley's presumption favoring the retroactive application of federal statutes, the Court recognized two exceptions to the presumption that appellate courts are to apply the law in effect at the time of decision. First, the presumption does not apply where there is clear congressional intent to the contrary. Bradley, 416 U.S. at 711. Second, the presumption does not govern where retroactive application of the new law would result in "manifest injustice" to one of the parties. Id.; see also Kaiser, 110 S. Ct. at 1577.

Bradley held that courts are to determine whether manifest injustice exists by examining "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." Bradley, 416 U.S. at 717. The meaning of the Bradley "manifest injustice" test has been obfuscated by subsequent Supreme Court opinions, however. For example, the Bradley Court originally stated that the Bradley presumption would not be applied to "deprive a person of a right that had matured or become unconditional." Id. at 720. However, in Bennett v. New Jersey, 470 U.S. 632 (1985), the Court stated that this limitation on Bradley "comports with another venerable rule of statutory interpretation, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." Id. at 639. Thus, the Bennett court either declined to enter the Bradley analysis at all or else possibly revised prong (b) of the Bradley manifest injustice test from what appeared to be "vested rights" to any "substantive right or liability," see Kaiser, 110 S. Ct. at 1585 (Scalia, J., concurring). But see id. at 1593 (White, J., dissenting) (plaintiff did not have a "vested" right to postjudgment

(continued...)

The Bradley court read Thorpe v. Housing Authority of City of Durham, 393 U.S. 268 (1969), as standing for the proposition that "even where the inter[vening] law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." Bradley, 416 U.S. at 715. Bradley expressly rejected the contention that "a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." Id.

In direct conflict with the Bradley presumption is another line of Supreme Court precedent, the most recent illustration of which is Bowen v. Georgetown University Hospital, ___ U.S. ___, 109 S. Ct. 468 (1988). Bowen examined the authority of the Secretary of Health and Human Services ("Secretary") to promulgate retroactive regulations setting limits on the level of reimbursable medicare costs. In 1981, the Secretary issued a new cost-limit schedule that contained a change in the method for calculating the "wage index," which reflects the salary levels for hospital employees in different parts of the country. The new calculation excluded federal hospital wages from the wage index. Various hospitals sued to enjoin enforcement of the 1981 cost-limit schedule. The district court struck down the 1981 wage-index on the ground that the Secretary had failed to provide notice and an opportunity for comment as required by the Administrative Procedure Act, 5 U.S.C. § 551. In 1984, ten months after the district court's ruling, the Secretary sought public comment on a proposal to reissue the 1981 wage index rule, retroactive to July 1, 1981. After considering the comments submitted, the Secretary

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[10] (...continued)
interest under the Bradley "manifest injustice" test). Given these ambiguous signals from the Court, we are inclined to agree with Justice Scalia's criticism that "manifest injustice" means "almost anything" and is in fact nothing more than "a surrogate for policy preferences." Kaiser, 110 S. Ct. at 1587 (Scalia, J., concurring).

reissued the 1981 cost-limit schedule and required a group of seven hospitals who had benefited from the invalidation of the 1981 schedule to return over $2 million in reimbursement payments. See Bowen, 109 S. Ct. at 471.

The Bowen Court struck down the retroactive cost-limit rules on the ground that Congress had not authorized the Secretary in the Medicare Act to issue retroactive rules. In so doing, the Supreme Court reaffirmed the rule that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Id.

The Supreme Court recently acknowledged that an "apparent tension" exists between the Bradley and Bowen lines of precedent in Kaiser Aluminum & Chemical Corp. v. Bonjorno, ___ U.S. ___, ___, 110 S. Ct. 1570, 1577 (1990). The majority found that it did not need to reconcile the apparent conflict, however, "because under either view, where the congressional intent is clear, it governs." Id. The Kaiser court went on to hold that the plain language of the statute at issue evidenced clear congressional intent against retroactivity. Id. at 1577-78.

Having found in Part III.A. of this opinion that the language and legislative history of the Restoration Act do not evidence a clear congressional intent for or against its retroactive application, we have struggled in vain to reconcile the Bradley and Bowen lines of precedent. We have concluded, however, that under the circumstances of this case the Bradley and Bowen line of cases are in "irreconcilable contradiction," see Kaiser, 110 S. Ct. at 1579 (Scalia, J., concurring). Where congressional intent on retroactivity is ambiguous, we simply cannot harmonize the presumption that a new statute should be applied retroactively even if it "does not explicitedly [sic] recite that it is to be applied to pending cases," Bradley, 416 U.S. at 715, with the contrary pre-

sumption that "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result," Bowen, 109 S. Ct. at 471. Application of either principle directly countermands the other in the situation where, as before us, congressional intent on retroactivity is unclear.

We recognize the possibility that even where congressional intent on retroactivity is unclear, application of either the Bradley or Bowen presumption may result in the same outcome by virtue of Bradley's "manifest injustice" exception. See supra note 10. However, we agree with Justice Scalia's observation in Kaiser that "[i]n the rules of construction they announce, if not in the results they produce, these two lines of cases are . . . in irreconcilable contradiction." Kaiser, 110 S. Ct. at 1579 (Scalia, J., concurring). In our view, the appropriate legal analysis is to decide first whether the Bradley presumption applies before going on to analyze whether the case nevertheless falls within the "manifest injustice" exception. See Bradley, 416 U.S. at 711-721 (deciding first that presumption governs, then examining whether "manifest injustice" exception applies). Thus, we are faced squarely with the issue recognized but left unresolved in Kaiser; namely, when congressional intent on retroactivity is unclear, which presumption -- Bradley or Bowen -- is to govern?

Forced to elect between these contradictory presumptions, we choose Bowen. We find that the Bowen line of cases is well-entrenched in the history of the Supreme Court jurisprudence, whereas Bradley is largely unsupported by its cited authorities.

We are strongly persuaded by Justice Scalia's observation in his concurring opinion in Kaiser that the presumption of prospective application of statutes is supported by over 150 years of Supreme Court precedent, stretching from the early part of the nineteenth century to the middle of this century. See Kaiser, 110 S. Ct. at

1579-81 (Scalia, J., concurring) (citing in part: United States v. Heth, 7 U.S. (3 Cranch) 399, 413 (1806) ("Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied"); Miller v. United States, 294 U.S. 435, 439 (1935)("[A] statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears")).

In contrast with this long line of precedent, with the exception of Thorpe, 393 U.S. 268, none of the cases cited by Bradley stand for the proposition that statutes are presumed to apply retroactively. Instead, the cited decisions involve either: the retroactive application of judicial decisions,[11] see Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 542 (1941); Patterson v. Alabama, 294 U.S. 600, 607 (1935); Sioux County v. National Surety Co., 276 U.S. 238, 240 (1928); Dorchy v. Kansas, 264 U.S. 286, 291 (1924); Moores v. National Bank, 104 U.S. 625, 629 (1882), the retroactive application of statutes that contain express language requiring this result, see Dickinson Industrial Site, Inc. v. Cowan, 309 U.S. 382, 383 (1940); Carpenter v. Wabash Ry. Co., 309 U.S. 23, 27 (1940); Stephens v. Cherokee Nation, 174 U.S. 445, 477-78 (1899); Freeborn v. Smith, 69 U.S. (2 Wall.) 160, 162 (1865), a statute that must necessarily be applied prospectively because the dispute involves either injunctive relief, see Dinsmore v. Southern Express Co.,

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[11] That judicial decisions operate retroactively lends no support to the argument that there is a presumption for retroactive operation of statutes. See United States v. Security Industrial Bank, 459 U.S. 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student"). Judicial decisions operate retroactively because we generally regard them as an expression of pre-existing law. See Kaiser, 110 S. Ct. at 1582 (Scalia, J., concurring).

183 U.S. 115, 120 (1901), or a permit for future action, see Ziffrin v. United States, 318 U.S. 73, 78 (1943), a case remanding to a state court in order for the state court to determine the effect of a newly enacted state statute, see Missouri ex rel. Wabash Ry. Co. v. Public Service Comm'n, 273 U.S. 126, 131 (1927), a case involving the general rule that criminal penalties cannot be enforced following the repeal of the statute that proscribed the conduct giving rise to the penalty, see United States v. Chambers, 291 U.S. 217, 222-23 (1934), and a case staying further proceedings where the outbreak of World War I, made it impossible for the citizen of a belligerent nation to continue to represent himself, see Watts, Watts & Co. v. Unione Austriaca di Navigazione, 248 U.S. 9, 22-23 (1918). See also Kaiser, 110 S. Ct. at 1583-84 (Scalia, J., concurring) (discussing above cases).

The rule that, absent clear congressional intent to the contrary, statutes are presumed to apply prospectively was uncontroverted until the Supreme Court decided Thorpe in 1969. See Kaiser, 110 S. Ct. at 1581 (Scalia, J., concurring). Thorpe involved a federal regulation requiring landlords to inform tenants of the reasons for eviction. The Thorpe court retroactively applied the regulation and invalidated an eviction order issued eighteen months prior to the promulgation of the regulation. In contrast to the longstanding presumption of prospective application of statutes, Thorpe held that "[t]he general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision." Thorpe, 393 U.S. at 281. In support of this rule, Thorpe cited five cases, four of which, Vandenbark, Carpenter, Chambers, and Ziffrin, we have already examined and found unsupportive. The fifth case Thorpe cited was United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801), which involved the question of whether the United States could condemn a captured French vessel. After the lower court ruled in the affirmative, and be-

fore the Supreme Court heard the case, the United States entered into a convention with France providing for the return of French "property captured and not yet definitively condemned . . . ." Id. at 103 (emphasis in original). The Court discussed the lower court's ruling and concluded that it did not constitute a "definitive" condemnation of the vessel within the meaning of the treaty:

> The argument at the bar which contends that because the sentence of the circuit court is denominated a final sentence, therefore its condemnation is definitive in the sense in which that term is used in the treaty, is not deemed a correct argument . . . . The last decree of an inferior court is final in relation to the power of that court, but not in relation to the property itself, unless it be acquiesced under. The terms used in the treaty seem to apply to the actual condition of the property, and to direct a restoration of that which is still in controversy between the parties . . . . In this case the sentence of condemnation was appealed from. It might have been reversed, and therefore was not such a sentence as in the contemplation of the contracting parties, on a fair and honest construction of the contract, was designated as a definitive condemnation.

Id. at 108-09. On this basis, the Court stated: "if, subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed . . . ." Id. at 110. The Court's reference to a law which "intervenes and positively changes the rule which governs" must be taken in context. The terms of law before the [sic?] The

Schooner Peggy Court required retroactive application to "all property captured and not yet definitively condemned" by the courts. Thus, under the actual facts of The Schooner Peggy, a change in the law while a case was pending was applied by the Supreme Court where by its terms, the law was to be applied retroactively to pending cases, a position entirely in keeping with the Bowen line of cases. Thorpe marked the first departure from this long line of precendent [sic] when it broadened the rule set forth in The Schooner Peggy: "Thorpe thus stands for the proposition that even where the inter [vening] law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." Bradley, 416 U.S. at 715.

We conclude that Thorpe rested its holding on cases that either offer no support for that proposition or lend support to the opposite proposition. Faced with a choice between the long-standing and authoritative Bowen line of precedent and Bradley, which has only Thorpe in support, we elect the presumption reflected in the more recent decision in Bowen that "[a] statute is deemed to be effective only for the future unless a contrary intent appears." Kaiser, 110 S. Ct. at 1588 (Scalia, J., concurring).

Our decision not to apply the Bradley presumption is supported by the Supreme Court's decision in Bennett v. New Jersey, 470 U.S. 632 (1985). Bennett involved an attempt by the Secretary of Education to recover from the state of New Jersey Title I funds that the Secretary of Education had determined New Jersey misused during the years 1970 to 1972. New Jersey argued, relying on Bradley, that the 1978 amendments to Title I, which relaxed the eligibility requirements for Title I funds, should be applied retroactively to determine whether the 1970-72 funds were misused. The Third Circuit agreed, and remanded the case to the Department of Education to determine whether the disputed expenditures conformed

to the more lenient 1978 Title I standards. The Supreme Court reversed, concluding that the Third Circuit's reliance on the Bradley presumption was inappropriate.

Although Bennett in part based its holding on the unique contractual nature of the obligations arising under the Title I program, the Court also concluded that "Bradley itself suggest[s] that changes in substantive requirements for federal grants should not be presumed to operate retroactively." Id. at 638. The Court elaborated:

> [The Bradley] holding rested on the general principle that a court must apply the law in effect at the time of its decision, which Bradley concluded holds true even if the intervening law does not expressly state that it applies to pending cases. Bradley, however, expressly acknowledged limits to this principle. "The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional." This limitation comports with another venerable rule of statutory interpretation, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect.

Id. at 639 (citations omitted).

In this case DeVargas seeks to impose substantive liability on the LANL defendants in their individual capacities through a retroactive application of the Restoration Act to section 504. As in Bennett, we find compelling grounds for not invoking Bradley where to do

otherwise would conflict the "venerable rule of statutory interpretation, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect," Bennett, 470 U.S. at 639. But see Leake, 695 F. Supp. 1414, 1417 (E.D.N.Y. 1988) (stating that the Restoration Act must be retroactively applied and Bennett is not controlling because the Restoration Act merely gives plaintiff a remedy to redress the violation of his rights), aff'd, 869 F.2d at 131 (affirming Leake for substantially the reasons given by the district court). We hold that the Restoration Act should not be applied retroactively.

IV.

We next address the remaining federal defendant, Gary Granere, the Acting Area Manager for the DOE's LANL office. DeVargas states that his "only claim against any federal defendant on this appeal is that Defendant Granere failed to adequately perform his duty to properly administer the University of California -- Mason & Hanger contract and failed to properly supervise the state and private defendants." We are uncertain whether DeVargas intends this statement to relate to his section 504 claim. Assuming arguendo that DeVargas can bring a section 504 suit against a federal employee for nonintentional conduct, we conclude that the analysis applicable to the individual LANL defendants is equally applicable here. Prior to the Restoration Act, section 504 was program-specific and did not encompass the actions of Granere. We affirm the dismissal of DeVargas's claims against Granere.

V.

We rest our holding that the district court properly dismissed DeVargas's section 504 claim on the applicable law and the intent of Congress. We therefore conclude that further factual development was unnecessary and that the district court did not abuse its discretion in rejecting DeVargas's request for further discovery under

Federal Rule of Civil Procedure 56(f). See Patty Precision v. Brown & Sharpe Mfg. Co., 742 F.2d 1260, 1264 (10th Cir. 1984) (reviewing trial court's Rule 56(f) determination under an abuse of discretion standard).[12]

VI.

We now address DeVargas's argument that the application of IMD 6102 constituted a deprivation of his clearly established right to substantive due process of law under the fifth and fourteenth amendments. In DeVargas I we rejected a similar argument: that the application of IMD 6102 violated DeVaragas's [sic] clearly established rights under the equal protection clause of the fourteenth amendment. See DeVargas I, 844 F.2d 714 (10th Cir. 1988). DeVargas I ruled that because the defendants' actions did not implicate a fundamental constitutional right, there could be no constitutional violation if there was a rational relationship between the governmental objective and the conduct in question. We held that it was rational for the DOE to conclude that fully sighted persons would more capably guard the nuclear and classified material at LANL than persons

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[12] Because of our holding in this case, we need not resolve the open issue of whether section 504 permits the recovery of monetary damages for intentional discrimination. Compare Smith v. Robinson, 468 U.S. 992, 1020 n.24 (1984) ("Without expressing an opinion on the matter, we note that courts generally agree that damages are available under § 504.") and Greater Los Angeles Council on Deafness, Inc. v. Zolin, 812 F.2d 1103, 1107 (9th Cir. 1987) (assuming availability of damages) and Carter v. Orleans Parish Pub. Schools, 725 F.2d 261, 264 (5th Cir. 1984) (per curiam) (assuming availability of damages for intentional violations) and Miener v. Missouri, 673 F.2d 969, 977-79 (8th Cir.), cert. denied, 459 U.S. 909, 916 (1982) with Board of Educ. of E. Windsor Regional School Dist. v. Diamond, 808 F.2d 987, 996 n.5 (3d Cir. 1986) (reserving question) and Manecke v. School Bd. of Pinellas County, 762 F.2d 912, 921-22 & n.8 (11th Cir. 1985) (availability of damages an "open" and "murky" question), cert. denied, 474 U.S. 1062 (1986) and Hurry v. Jones, 734 F.2d 879, 886 (1st Cir. 1984) (reserving question).

with visual handicaps. See DeVargas I, 844 F.2d at 725.

We engage in a similar analysis for a substantive due process challenge. See Oklahoma Ed. Ass'n v. Alcoholic Beverage Enforcement Comm'n, 889 F.2d 929, 935 (10th Cir. 1989). We first determine whether IMD 6102 infringes on any fundamental constitutional right. We conclude that it does not. See id.; Coleman v. Darden, 595 F.2d 533, 538 (10th Cir.)(no fundamental constitutional right to government employment), cert. denied, 444 U.S. 927 (1979); Oklahoma Ed. Ass'n, 889 F.2d at 932-33 (no fundamental constitutional right to private employment). We also note that IMD 6102 is not like the statutory conclusive presumption struck down in Cleveland Board of Education v. LaFluer, 414 U.S. 632 (1974), which required school teachers to take maternity leave without pay beginning five months before the expected birth of child. LaFluer rested on the importance of restricting governmental intrusion into "matters so fundamentally affecting a person as the decision whether to bear or beget a child." Id. at 640 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)). See also Weinberger v. Salfi, 422 U.S. 749, 771 (1975). There is no governmental intrusion concerning a fundamental right at issue in this case. We therefore require only that IMD 6102 bear a rational relationship to a legitimate governmental purpose, see Oklahoma Ed. Ass'n, 889 F.2d at 935. The governmental concern with protecting the classified and nuclear material at LANL, together with "the logical inference that a fully sighted person may perform those security functions more capably than an individual only partially sighted, go far to show such a rational basis." DeVargas I, 844 F.2d at 725.

VII.

Finally, we address DeVargas's claim under 18 U.S.C. section 1983. Because there is no violation of either section 504 of the Rehabilitation Act or substan-

tive due process under the Constitution, no violation of law exists upon which DeVargas may rest a section 1983 suit. We hold that the district court properly dismissed the section 1983 claim.

VIII.

We **AFFIRM** the district court's grant of summary judgment in favor of the defendants.

[Filed August 9, 1990]